Supreme Court, U.S.
FILED

01 537 SEP 26 2001

No. _____

In the Supreme Court of the United States

WESTECH LABORATORIES, INC.,
Petitioner,

v.

JACK DILLENBERG, et al.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Eric H. Zagrans
Counsel of Record
The Zagrans Law Firm
A Legal Professional Association
5338 Meadow Lane Court
Elyria, OH 44035-1469
(440) 934-7000

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

QUESTION PRESENTED

Petitioner operated a state licensed environmental testing laboratory. The license conferred upon its holder the right to have its test data accepted by state regulators for compliance purposes. Based upon an investigation which found an alleged deficiency in one out of more than 200 testing methodologies Petitioner employed, and without any contention that the alleged deficiency created an imminent risk to public health or safety, the Respondent state officials effectively extinguished Petitioner's rights and status under its license, before according Petitioner an administrative due process hearing, by communicating directly with Petitioner's customers that its test data was "suspect" and no longer acceptable for compliance purposes, and that it was "off the list" of licensed laboratories. By taking such actions to ensure that Petitioner's customers would no longer use its services, Respondents effectively revoked Petitioner's license.

Respondent state officials held no pre-deprivation hearing, and delayed holding a post-deprivation hearing until fourteen months after the constructive revocation of Petitioner's license and long after its business had been destroyed. The Ninth Circuit affirmed the district court's dismissal of Petitioner's complaint for failure to state a claim upon which relief can be granted. The question presented is:

> Whether a business that has been effectively deprived of its license ***cannot***, under any set of facts, ***state a claim*** under the Due Process Clause of the Fourteenth Amendment where no pre-deprivation process is afforded, and where there is a substantial delay in holding a post-deprivation hearing, during which time the license holder, unable to operate without its license, has gone out of business?

PARTIES TO THE PROCEEDING

Petitioner

Petitioner Westech Laboratories, Inc. is a Delaware corporation that is a wholly-owned subsidiary of WTI, Inc., another Delaware corporation. Westech Laboratories, Inc. has no subsidiaries.

Respondents

Jack Dillenberg, the Director of the Arizona Department of Health Services; Barbara Erickson, the Laboratory Director for Laboratory Services of the Arizona Department of Health Services; Steven D. Baker, the Senior Auditor and Program Manager of the Environmental Laboratory Licensure Section of the Office of Laboratory Licensure and Certification of the Arizona Department of Health Services; and James Griffith, the Deputy Director of the Arizona Department of Health Services, in their respective individual capacities together with the communities comprised of the foregoing individuals and their respective spouses, if any.

In addition, the foregoing persons, along with James R. Allen, the successor to Jack Dillenberg as Director of the Arizona Department of Health Services, were sued in their respective official capacities as state officials, together with their various successors in office, solely for purposes of the request for prospective injunctive relief.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Statutory Framework For State Regulation 5
1. Obtaining A License From The State 5
2. Maintaining The License 6
3. Suspending Or Revoking A License 6
a. Pre-Suspension or Pre-Revocation Due Process Hearing Is Required Unless Emergency Situation Poses Immediate Threat To Public Safety 6
b. Pre-Suspension Or Revocation Opportunity To Cure Deficiencies . . . 7

B. The State Regulators' Actions Against Westech . 8
1. The Fall 1994 Audit 8
2. Westech's Remedial Efforts In 1995 9
3. ADHS Investigation In June 1995 10
4. The Revocation Notice And Related Actions Of ADHS Officials; No Public Health Risk Involved 12

5. The ADHS Hearing Held After Westech's License Rights Taken, Business Destroyed, And License Reverted 12

C. Proceedings In The District Court 14

D. Proceedings On Appeal 17

REASONS FOR GRANTING THE WRIT 19

THE NINTH CIRCUIT DEPARTS FROM THIS COURT'S SETTLED JURISPRUDENCE, AND CONFLICTS WITH ITS SISTER CIRCUITS, BY CREATING A BRIGHT-LINE RULE OF LAW THAT EVEN SUBSTANTIAL DELAYS IN HOLDING A POST-DEPRIVATION HEARING CANNOT VIOLATE DUE PROCESS 19

CONCLUSION 27

APPENDIX 1a

Appendix A - Court of Appeals Opinion 1a

Appendix B - District Court Order 4a

Appendix C - Judgment in a Civil Case 14a

Appendix D - Notice of Appeal 16a

Appendix E - Complaint 18a

Appendix F - Proposed Form of Judgment . . . 37a

Appendix G - Arizona Code Sections 40a

TABLE OF AUTHORITIES

Barry v. Barchi,
443 U.S. 55 (1979) 19, *20*

Chalkboard, Inc. v. Brandt,
902 F.2d 1375 (9th Cir. 1989) 15

Cleveland Bd. of Educ. v. Loudermill,
470 U.S. 532 (1985) 18, 19, 21, 23

Coleman v. Watt,
40 F.3d 255 (8th Cir. 1994) 21

Conley v. Gibson,
355 U.S. 41 (1957) 20

FDIC v. Mallen,
486 U.S. 230 (1988) 21

Hishon v. King & Spalding,
467 U.S. 69 (1984) 20

Jones v. City of Gary, Indiana,
57 F.3d 1435 (7th Cir. 1995) 22

Parratt v. Taylor,
451 U.S. 527 (1981) 15

Paul v. Davis,
424 U.S. 693 (1976) 16, 26

Pierce v. Netzel,
2000 U.S. App. LEXIS 16968 at *4-6
(2nd Cir. 2000) 22

Pollock v. Baxter Manor Nursing Home,
706 F.2d 236 (8th Cir. 1983) 22

Siegert v. Gilley,
500 U.S. 226 (1991) 26

Soranno's Gasco, Inc. v. Morgan,
874 F.2d 1310 (9th Cir. 1989) 18, 21

Weller v. Dept. of Social Services for the City of Baltimore,
901 F.2d 387 (4th Cir. 1990) 22

Constitution

U.S. Const. Amend. XIV § 1 1

Statutes and Regulations

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 14-15

A.R.S. § 36-495(1)(a) 3, 5

A.R.S. § 36-495(4) 3, 5

A.R.S. § 36-495.01(D) 3, 5

A.R.S. § 36-495.07(A) 6

A.R.S. § 36-495.09(A) 6-7

A.R.S. § 36-495.09(B) 7

A.R.S. § 36-495.09(C) 6-7

A.R.S. § 41-1064(C) 7, 20
A.A.C. § R9-14-601, et seq. 2

A.A.C. § R9-14-601 6

A.A.C. § R9-14-607 6

PETITION FOR A WRIT OF CERTIORARI

Petitioner Westech Laboratories, Inc. ("Westech") respectfully prays that a writ of certiorari be issued to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit affirming the dismissal of Westech's amended complaint (App., *infra*, 1a-3a) is not reported. The order of the United States District Court for the District of Arizona granting the motion to dismiss the amended complaint (App., *infra*, 4a-13a) is not reported.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its memorandum opinion on June 28, 2001. App., *infra*, 1a-3a. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

Pursuant to this Court's Rule 14.1(f), the relevant provisions of Arizona environmental testing laboratory licensing law involved in this case, including without limitation Arizona Revised Statutes ("A.R.S.") §§ 36-495 through 36-495.16, inclusive, and Arizona Administrative Code ("A.A.C.") R9-14-601 through R9-14-618, inclusive, are set forth at App., *infra*, 40a-116a.

STATEMENT OF THE CASE

This case arises out of regulatory excesses and lawless agency actions – actions by state regulators, taken without due process of law and in disregard for their own rules and policies, that unjustly and unnecessarily destroyed the ability of a regulated firm to continue in business.

In 1992, Westech received from the Arizona Department of Health Services ("ADHS") its license to provide environmental compliance testing for acceptance by another state agency, the Arizona Department of Environmental Quality ("ADEQ").[1] ADEQ regulates municipalities and other entities throughout Arizona, and requires them to submit the results of environmental testing, performed only by licensed testing laboratories, in order to show that the water, soils and/or air in their communities satisfactorily comply with environmental laws and regulations.

By issuing a license to Westech, the State of Arizona conferred upon Westech the right to be able to submit the

---

[1] ADHS issued Westech's license under the then newly enacted regulations set forth at A.A.C. R9-14-601, *et seq.* (App., *infra*, 90a), governing environmental testing laboratories.

results of its environmental testing on behalf of its municipal and other customers to ADEQ for compliance purposes.[2] This status as an approved testing laboratory whose test results will be accepted by ADEQ is the sole purpose, meaning and *raison d'etre* of Westech's license; indeed, this status ***is*** the license. Thus, Westech's interest in its license granted by ADHS translates into a protected property interest in its right or status to have its environmental testing results accepted by ADEQ for compliance purposes.

In 1995, ADHS officials initiated proceedings to revoke Westech's license based upon an investigation which found alleged deficiencies in ***one*** out of more than 200 laboratory testing methodologies it employed.[3] However, before according Westech an administrative due process hearing in which it could defend itself and refute the unfounded allegations, and ***without any claim or contention that immediate, pre-emptive action was needed to protect the public health or safety*** (because even if the alleged deficiencies existed they would not have created a health risk

---

[2] Westech's license to operate an environmental laboratory entitled Westech's testing data of environmental samples taken from its customers to be acceptable to ADEQ (and to be perceived as being acceptable) for compliance purposes. An unlicensed environmental laboratory may collect samples and testing data but is not entitled to submit such data to ADEQ for compliance purposes (*see, e.g.*, A.R.S. §§ 36-495(1)(a), 36-495(4) and 36-495.01(D), App., *infra*, 40a-43a), and thus would be useless to customers who are regulated by ADEQ and who must prove that they are in compliance with Arizona's environmental laws and regulations.

[3] EPA Methology 502.2, which tests for the presence and level of organic compounds in drinking water.

to the public), the state regulators effectively extinguished Westech's rights and status under its license when they:

(i) communicated directly with ADEQ and falsely accused Westech of cheating on quality control and of submitting false test results. ADEQ was also explicitly told that Westech was "off the list" of licensed testing laboratories long before any such action was in fact taken;

(ii) communicated directly with Westech's municipal customers throughout Arizona (who are themselves regulated by ADEQ), and informed them that Westech's test data were "suspect" and "no longer acceptable" to ADEQ for compliance purposes. They were told that, if they continued to use Westech, (a) their test results would not be accepted, (b) they would have to perform additional site investigations, and (c) their costs would not be reimbursed by the state; and

(iii) issued a press release and other media communications that directly and foreseeably caused widespread news reports that Westech had lost its license and had been closed down by ADHS.

These actions by the ADHS officials caused ADEQ to reject Westech testing data which, in turn, destroyed Westech's customer base; its customers had no use for Westech if its testing data of environmental samples taken in their communities could not be submitted to ADEQ for compliance purposes. As noted above, ADEQ's acceptance of Westech's test data is precisely the only function and purpose of its state-conferred license. Westech's customers reasonably understood from the regulators' statements that they could no longer do business with Westech, and they took their business to Westech's three principal competitors. By directly causing ADEQ to reject Westech testing data and

Westech's customers to turn to other environmental laboratories, the state regulators destroyed Westech's ability to operate and do business with its customers, without affording it a due process hearing, as effectively as if the "paper" license had been taken away. Westech's business and property interests, as well as its business reputation, were fatally injured. Westech went out of the laboratory testing business shortly after these events and months before ADHS convened a due process hearing, which eventually (but far too late to salvage its business) exonerated Westech.

A. The Statutory Framework for State Regulation

1. Obtaining a License from the State

Municipalities and other governmental entities in Arizona must submit environmental test data obtained from a licensed environmental testing laboratory to ADEQ to demonstrate their compliance with Arizona environmental laws and regulations. (App., *infra*, 40a-116a.) Similarly, A.R.S. § 36-495.01(D) provides that all environmental laboratories engaged in compliance testing and operating within the State of Arizona must be licensed and regulated by ADHS. (App., *infra*, 43a).[4] An unlicensed environmental laboratory may collect samples and testing data but is not entitled to submit such data to ADEQ for compliance purposes (*see, e.g.*, A.R.S. §§ 36-495(1)(a), 36-495(4) and 36-495.01(D), App., *infra*, 40a-43a), and thus would be useless to customers who are regulated by ADEQ and who

---

[4] *See also* A.R.S. § 36-495.01(A) (App., *infra*, 42a) ("[ADHS] shall license environmental laboratories engaged in compliance testing").

must prove that they are in compliance with Arizona's environmental laws and regulations.

In April 1992, Westech received its license to operate an environmental testing laboratory and to submit its testing data to ADEQ for compliance purposes pursuant to A.A.C. R9-14-601. (App., *infra*, 90a.)

2. Maintaining the License

ADHS is required to audit licensed environmental testing laboratories on an annual basis. (A.R.S. § 36-495.07(A); A.A.C. R9-14-607; App., *infra*, 49a, 101a.)

3. Suspending or Revoking a License

a. Pre-Suspension or Pre-Revocation Due Process Hearing Is Required Unless Emergency Situation Poses Immediate Threat To Public Safety

Once issued, Arizona law treats the license and the rights it confers upon the license-holder as protected property interests.[5] Section 36-495.09(C) of the Arizona Revised

---

[5] Indeed, there are only four specific and limited grounds for denying, revoking or suspending a laboratory operating license: (i) violating the requirements for licensure or any other provision of A.R.S. §§ 36-495 *et seq.* regulating environmental laboratories or rules promulgated thereunder, (ii) issuing a report on laboratory work performed by another laboratory without identifying the lab that performed the tests, (iii) committing a felony offense in connection with the operation of a laboratory, and (iv) knowingly aiding, abetting or permitting the submission of false or inaccurate information. A.R.S. § 36-495.09(A) (App., *infra*, 51a.)

Statutes provides, in pertinent part, that the director of ADHS "***shall not suspend, revoke*** or deny ***a license without affording the licensee*** notice and ***an opportunity for a [due process] hearing*** as provided in title 41, chapter 6." (Emphasis supplied.) (App., *infra*, 51a.) The statute thus mandates a pre-suspension or pre-revocation hearing in all cases.

Under Arizona law, there is a narrow exception to the pre-deprivation hearing requirement where some exigency or emergency exists immediately threatening the safety of the public at large. In such cases, the Director of ADHS may immediately terminate specific testing services, procedures or practices. *See* A.R.S. §§ 36-495.09(B) and 41-1064(C), App., *infra*, 52a, 68a. These Arizona statutes comport with this Court's determination that "either the necessity of quick action by the State [to protect the public interest] or the impracticality of providing any meaningful pre-deprivation due process, when coupled with the availability of [post-deprivation procedures], can satisfy the requirements of procedural due process." *Parratt v. Taylor*, 451 U.S. 527, 539 (1981). However, in this case, ***no such immediate threat to public life or safety existed or was even claimed to exist***.

b. Pre-Suspension or Revocation Opportunity to Cure Deficiencies

Moreover, in late 1994, ADHS developed and promulgated a written environmental laboratory sanctions policy setting forth the factors that ADHS would apply in its enforcement actions against regulated laboratories. The sanctions policy confirmed the intent of the state regulators to ***allow laboratories charged with deficiencies a reasonable opportunity cure or eliminate such deficiencies***. *See* A.A.C. R9-14-604(F) (App., *infra*, 51a).

B. The State Regulators' Actions Against Westech

Until the complete destruction of its business, Westech was the largest testing laboratory in Arizona with a long and proven track record of successful operation. Westech had operated as a regulated environmental testing laboratory under the license it received from ADHS, and had successfully undergone periodic audits by ADHS and its officials. (App., *infra*, 21a.)

1. The Fall 1994 Audit

In the fall of 1994, after conducting their annual, two-day audit of Westech, ADHS officials reported to Westech on October 7, 1994, that the audit had uncovered "widespread falsification of test data and test reporting." While no specifics were provided, Westech voluntarily terminated its drinking water organics testing until ADHS had completed a more thorough investigation. (App., *infra*, 22a.)

Westech's subsequent internal investigation resulted in the termination of two laboratory employees and the resignation of a third. In addition, Westech decided to restructure its quality assurance and quality control systems, and retained various outside experts to assist in such efforts. (App., *infra*, 23a.)

In January 1995, following additional investigation in late November and early December 1994, ADHS officials decided to suspend Westech's regular license and to impose specific conditions on Westech's continued ability to operate and to conduct and submit compliance testing. No mention was made at any time of license revocation. ADHS confirmed to Westech that compliance with its conditions was

a "process" not an "event," and that Westech would be allowed adequate time to demonstrate full compliance. (App., *infra*, 23a-24a.) ADHS also confirmed that it would consider the results of independent third-party audits of the laboratory's functions in analyzing Westech's compliance with the conditions imposed. (App., *infra*, 26a.)

In mid-January 1995, ADHS issued a press release about the situation in which Director Dillenberg stated: "I anticipate that Westech, with [ADHS's] guidance, will correct the deficiencies and remain a viable testing laboratory in the state." After describing Westech's willingness to cooperate with ADHS, the press release confirmed that the enforcement action taken against Westech "does not mean that water provided by Westech's clients is unsafe to drink." (App., *infra*, 23a.)

2. Westech's Remedial Efforts in 1995

Shortly after the press release, an ADHS auditor performed another on-site investigation, concluded that Westech was now in compliance with the testing requirements of Method 502.2, and cleared Westech to resume drinking water testing. Westech considered the favorable determination as evidence that its corrective measures were working. Bolstered by this successful compliance report, Westech continued its corrective action program and spent $750,000 to implement the quality control changes and systems recommended by its outside experts. Notwithstanding ADHS clearance to do so, Westech decided not to resume using Method 502.2 to perform drinking water organics analyses for its clients until all changes had been implemented. (App., *infra*, 24a.)

Westech retained an ADHS-approved independent, third-party auditor to evaluate the laboratory's remedial efforts. After a two-day audit in mid-July 1995, the independent audit found that Westech "had an above-average commitment to producing quality measurements and complying with local, state and federal regulations" and appeared to have "gone most of the way in implementing systems that addressed its past deficiencies." ADHS was made aware of the audit and its findings. (App., *infra*, 26a.)

3. ADHS Investigation in June 1995

In June 1995, ADHS officials made two unannounced visits to collect laboratory documents to investigate a report concerning a single sample of drinking water in Scottsdale, Arizona, that had been analyzed on December 4, 1994, and re-analyzed on December 5, 1994. The report showed that the result for one organic compound was in excess of regulatory levels.

Westech had recently discovered a reporting error on the former report and had submitted a correction. The December 4 test (showing a high level for the one organic compound) had been inadvertently reported rather than the valid December 5 re-test (showing that organics were within regulatory limits). ADHS and ADEQ were immediately notified of the mistaken reporting of a discarded test result instead of the correct result. (App., *infra*, 25a.) ADHS officials issued a formal Statement of Deficiencies on July 28, 1995, alleging deficiencies in the laboratory's performance of Method 502.2.

However, ADHS officials labeled Westech's test data as "suspect" and caused ADEQ to reject such data without ever analyzing or investigating whether the test results were

affected by the alleged quality control deficiencies – in other words, without checking to see whether the data should be considered suspect. They neither audited the laboratory nor evaluated all of the data. They did not perform a materiality evaluation. They based their decision to condemn all of Westech's test data as "suspect" on a potential quality control problem with eight packets of test data produced by one analyst using one instrument. (App., *infra*, 26a-27a.) Furthermore, even though ADHS had approved that the analyst in question could perform tests using Method 502.2, and even though ADHS knew that Westech had passed an independent audit in mid-July 1995 "with flying colors," the ADHS officials made no effort to contact or speak with the analyst (or anyone else at Westech) about the data. (*Id.*) A proper audit cannot be performed without interviewing the analyst and other key laboratory personnel.

Furthermore, ADHS officials stated to Westech in June 1995 that the reviewed test data appeared to be in substantial compliance with ADHS requirements. Following a meeting with ADHS lawyers on June 26, 1995, Westech prepared and faxed in early July 1995 a revised consent agreement that was supposed to resolve the entire controversy initiated by the January 1995 Suspension Notice. Instead, ignoring the results of the July 1995 third-party audit which showed that Westech had corrected the identified deficiencies as agreed, ADHS officials abruptly "pulled the plug" on Westech's business on August 1, 1995 — over two months ***before*** the deadline they had given Westech to correct and eliminate the alleged deficiencies in its testing program. (App., *infra*, 24a-26a.)

4. The Revocation Notice And Related Actions Of ADHS Officials; No Public Health Risk Involved

On August 1, 1995, Dillenberg issued a "Notice of Intent to Revoke Regular License" (the "Revocation Notice"), announcing without prior warning his intention to permanently revoke Westech's license. (App., *infra*, 26a.) The Revocation Notice was accompanied by a devastating press release issued to the major newspapers and damaging statements made to and interviews with the other media throughout Arizona. It was front-page news in the *Arizona Republic*, and other newspapers carried inaccurate and misleading headlines attributable to Defendants' statements such as "Water Test Lab Closed" and "Water-Testing Lab Loses License." (App., *infra*, 27a.)

Prior to any hearing, and without claiming that there was any imminent danger to public health or safety, the ADHS officials also conveyed to ADEQ and to Westech's customers the false allegation that all of Westech's testing (it was licensed to perform over 200 test methods) and data were unreliable and invalid. Their improper motive and purpose was to ensure that Westech's customers would cease doing business with Westech. The state officials accomplished their goal -- Westech's customer base immediately evaporated, and ADEQ rejected Westech's data solely based on the communications it had received from the ADHS officials. (App., *infra*, 27a-28a; 29a-30a.)

5. The ADHS Hearing Held After Westech's License Rights Taken, Business Destroyed, And License Reverted.

Although its business was badly damaged by the state

regulators' communications with ADEQ and its customers and by the pre-hearing smear campaign in the media, Westech was prepared to go forward with an immediate hearing (originally scheduled to begin a month after the Revocation Notice was issued on August 1, 1995) to respond to the charges, save its license and salvage its business before the state officials' efforts to destroy it succeeded completely. However, the state officials unjustifiably and unnecessarily delayed the commencement of the due process hearing for many months, from August 1995 until October 1996, which resulted in the complete destruction of Westech. (App., *infra*, 28a.)

Long before the hearing was finally held, Westech was forced to completely shut down its operations and sell off its laboratory assets at liquidation value in May 1996. (*Id.*)

Nevertheless, the state officials needlessly proceeded with the administrative hearing, beginning in October 1996 and lasting until June 1997, causing Westech to incur considerable additional expense, solely because Westech refused to sign a one-sided release demanded by ADHS which would have released ADHS and its officials from any liability for their misconduct but which would not have released Westech from potential charges or liabilities. (*Id.*)

In August 1997, the ADHS hearing officer rendered a 72-page decision containing recommended findings of fact and conclusions of law which determined, based on the evidence introduced at the administrative hearing, that ***ADHS' claim for revocation of Westech's regular license should be denied***. The hearing officer specifically found that ADHS written policy allows laboratories charged with deficiencies a reasonable opportunity to correct such deficiencies, and that "the numerous steps taken by Westech in response to the [ADHS audits and identified deficiencies] demonstrate a

commitment by Westech management to address those deficiencies and improve data quality significantly. These efforts further demonstrate that Westech management was not knowingly aiding, permitting or abetting the submission of false or inaccurate data at any time." (App., *infra,* 28a-29a.)

In May 1999, subsequent to the filing of the amended complaint in this case and after further unexplained and unjustified delays of more than 15 months, ADHS issued its final agency decision that concluded the entire matter was rendered moot by Westech's cessation of its laboratory business and sale of its laboratory assets in May 1996. In so doing, ADHS's final agency decision was completely at odds with the detailed and thoroughly-documented factual findings and the well-reasoned legal conclusions of its own hearing officer. (*See* App., *infra*, 29a.)

However, in November 1999, an administrative hearing officer awarded Westech over $560,000 of its attorneys' fees and costs incurred in connection with the license revocation hearing to be paid by ADHS because ADHS (i) did ***not*** prevail in the license revocation hearing, and (ii) was not substantially justified in holding such a hearing since Westech's rights under the license were terminated ***before*** the hearing commenced. ADHS appealed to the Superior Court for Maricopa County. On October 31, 2000, the Superior Court affirmed the hearing officer's decision and the award to Westech from ADHS. (App., *infra*, 37a-39a.)

C. Proceedings In The District Court

On July 31, 1996, Westech sued four senior officials of ADHS for money damages and injunctive relief under Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983,

for their actions taken under color of law which deprived Westech of its property rights and liberty interests and destroyed its business without due process of law in violation of the Fourteenth Amendment. On November 20, 1998, Westech filed a verified first amended and supplemental complaint against the ADHS officials. (App., *infra,* 18a-35a.)

On January 19, 1999, the ADHS officials filed a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint for failure to state a due process claim upon which relief can be granted. By order entered on August 31, 1999, the district court granted the motion and dismissed Westech's claims with prejudice and without leave to amend. (App., *infra*, 4a-13a.)

The district court correctly characterized Westech's first claim to be that the ADHS officials' conduct was the functional equivalent of summarily taking its state-conferred property right - its license - without due process. (App., *infra*, 11a.) Westech had relied as controlling precedent on the holding in *Chalkboard, Inc. v. Brandt*, 902 F.2d 1375 (9th Cir. 1989), that the summary, pre-hearing suspension of a plaintiff's license to operate a day care center, coupled with public communications to the day care center's customers that the center was closed down and they should take their business elsewhere, violated the plaintiff's rights to due process.

However, the district court erroneously distinguished the *Chalkboard* case on its facts from this case because, the court believed, "it is uncontested that [the ADHS officials] did not deprive Westech of its business license summarily or otherwise." (App., *infra*, 11a.) This is the sole stated basis for the district court's dismissal of Westech's property rights claim. While it is certainly true that Westech's license was

not "officially" suspended or revoked, such a distinction is not supportable in logic or in law because it would effectively insulate state agencies from having to afford constitutional protections at all unless they "officially" revoke a license.

With respect to Westech's second claim for relief against the ADHS officials for injuring its business reputation, the district court properly concluded, following this Court's decision in *Paul v. Davis*, 424 U.S. 693 (1976), that injury to reputation by itself is not a liberty interest protected by the Fourteenth Amendment. As the district court stated, "in order for the plaintiff to invoke the procedural protections of the Due Process [C]lause, he must allege, in addition to the stigma inflicted to his own reputation, the distinct alteration or extinction of a previously recognized right or status." (App., infra, 9a-10a, *citing Paul v. Davis, supra*, at 711).) This is precisely what Westech has alleged: that the actions of the ADHS officials, without affording Westech due process of law, not only irretrievably harmed its business reputation, but also caused the distinct alteration and extinction of its previously-recognized right or status (embodied in its license) to have its environmental testing data accepted by ADEQ for compliance purposes. However, the district court mistakenly concluded that Westech "is merely alleging an injury to its business reputation" without more. (App., *infra*, 10a-11a.) The district court simply ignored the fact that the defamatory statements in this case were made directly to ADEQ and to Westech's business customers (in addition to the regulators' statements made to the general public), and that they directly caused the alteration or extinction of Westech's previously recognized right or status to have its testing data accepted by ADEQ.

Westech's third claim for relief is that the state regulators needlessly delayed the revocation hearing originally

scheduled for September 1995 until after its business had been destroyed as a viable going concern. The district court concluded that Westech's "claim that [the ADHS officials] violated its due process rights by delaying the revocation hearing until October 1996 was moot following Westech's sale of its laboratory assets in May 1996." (App., *infra*, 12a.)

The district court failed to address the ADHS officials' deliberate delay from September 1995, when the due process hearing should have been held, through the time when the laboratory assets were sold at liquidation value in May 1996. The district court also ignored Westech claims that, if the hearing had been held in September 1995, before its business totally decimated, some portion of that business could have been salvaged. (*Id.*) Thus, the district court held in effect that Westech's claim that it should have received a due process hearing ***before*** its business was ruined by the state officials' actions is rendered moot merely because Westech sold its laboratory assets in May 1996 ***after*** its business had already been destroyed.

D. Proceedings On Appeal

On appeal to the Court of Appeals for the Ninth Circuit, Westech urged reversal and remand to the district court for the reasons set forth above. In an unpublished memorandum *per curiam* decision, the court of appeals affirmed the dismissal of all of Westech's claims for relief.

The Ninth Circuit correctly understood the essence of Westech's contention to be that "it was deprived of the essence of its license when [ADHS officials] informed Westech's customers that ADHS [*sic*, actually ADEQ] would not accept Westech test data." (App., *infra*, 3a.) After

assuming without deciding that the constructive revocation of a state-conferred license may trigger due process protections, the court of appeals cryptically held that Westech's due process claims were foreclosed by the decision in *Sorrano's Gasco, Inc. v. Morgan*, 874 F.2d 1310 (9th Cir. 1989).

In *Soranno's Gasco*, the Ninth Circuit held that (i) the plaintiff was deprived of its protected property interests when state officials communicated directly with the plaintiff's customers in an effort to persuade the customers to cease doing business with the plaintiff, thereby damaging the goodwill of its business, and (ii) the plaintiff was nonetheless not entitled to a ***pre***-deprivation hearing because the state had acted with legitimate concern to prevent an imminent risk to public health or safety. *See* 874 F.2 at 1317-18. Presumably, the Ninth Circuit in this case was citing to the second part of its holding in *Soranno's Gasco* as foreclosing Westech's claim that it deserved a pre-deprivation hearing. In so doing, however, the Ninth Circuit completely ignored the fact that the ADHS officials never determined or contended that Westech's alleged deficiencies posed any imminent danger to the public's health, safety or welfare.

The court of appeals then went on to reject, partially on the basis of the decision in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547 (1985), Westech's separate claim that the ADHS officials' intentional delay in holding the ***post***-deprivation hearing on the revocation of Westech's license until after their actions had destroyed its business constituted an independent due process violation. (App., *infra*, 3a.) Westech contends that the appellate panel has misinterpreted or misapplied the Court's holding in *Loudermill*.

The court of appeals also based its rejection of Westech's claim of unconstitutional delay on the panel's determination that "Westech's license remained in force throughout the period at issue [*i.e.*, between the state regulators' actions and the commencement of the hearing], so Westech was not prejudiced by any delay." (App., *infra*, 3a.) The court of appeals did not, however, address Westech allegations that its license ***did not remain in force*** or effect, and that it was prejudiced by the delay, because the constructive revocation in August 1995 culminated in the automatic forfeiture of the license when the business was forced to close by year end 1995 and to liquidate its assets in May 1996, both of which events were prior to the administrative hearing which began in October 1996.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT DEPARTS FROM THIS COURT'S SETTLED JURISPRUDENCE, AND CONFLICTS WITH ITS SISTER CIRCUITS, BY CREATING A BRIGHT-LINE RULE OF LAW THAT EVEN SUBSTANTIAL DELAYS IN HOLDING A POST-DEPRIVATION HEARING CANNOT VIOLATE DUE PROCESS

This Court has long recognized that, "[a]t some point, a delay in the [due process] hearing would [itself] become a constitutional violation." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 547 & n.12 (1985), *citing Barry v. Barchi*, 443 U.S. 55, 66 (1979) (recognizing due process

violation from administrative delay).[6] In this case, the state of Arizona contravened its own law requiring that due process hearings concerning license suspensions and revocations "be promptly instituted and determined." A.R.S. § 41-1064(C), App., *infra*, 69a. The state did not hold a hearing until more than ***fourteen months after it effectively revoked Westech's license***, by which time Westech had been utterly destroyed. The Ninth Circuit nonetheless affirmed the district court's dismissal of Westech's amended complaint for failing to state a claim,[7] thereby accepting the astonishing proposition that delaying a post-deprivation hearing by fourteen months *cannot*

---

[6] In *Barry v. Barchi*, a horse trainer's license was suspended without a pre-suspension hearing after a urinalysis indicated that his horse had been drugged before running a race. Addressing a New York statute which permitted an indefinite delay between suspension and hearing, the Court found that such delay violates due process; during the delay the full penalty of the suspension could be irreparably and mistakenly suffered before any hearing was held. *Id.*

[7] In reviewing the sufficiency of Westech's amended complaint for purposes of surviving a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, Westech's allegations must be accepted as true and liberally construed in the light most favorable to Westech. As this Court has repeatedly held, such motions may not be granted unless it appears "beyond doubt" that the plaintiff would not be entitled to relief under any set of facts which it could prove in support of its claim. *See, e.g., Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (dismissal is improper "unless it appears ***beyond doubt*** that the plaintiff can prove ***no set of facts*** in support of his claim which would entitle him to relief"). For the reasons set forth herein, it is not apparent "beyond doubt" that Westech can show no set of facts entitling it to relief.

violate due process.[8]

That stance offends this Court's clear dictate that a hearing must be provided at a "meaningful time," *Loudermill*, 470 U.S. at 547 – as determined in light of the relevant allegations and facts – and sharply separates the Ninth Circuit from its sister circuits. For the question whether "delay in completing a post-deprivation hearing [has] 'become a constitutional violation' . . . cannot be evaluated in a vacuum." *FDIC v. Mallen*, 486 U.S. 230, 242 (1988) (quoting *Loudermill*, 470 U.S. at 547). Instead, it can be answered only by "examin[ing] the importance of the private interest and the harm to this interest occasioned by the delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken." *Id.* Accordingly, where a post-deprivation hearing has been substantially delayed, other circuits have adopted a fact-intensive inquiry into whether that delay nonetheless comports with due process. *See, e.g., Coleman v. Watt*, 40 F.3d 255, 261 (8th Cir. 1994) ("[w]e conclude that the question of what caused the seven-day delay [in holding a hearing after

---

[8] The Ninth Circuit's citation to *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310 (9th Cir. 1989), as "foreclos[ing]" Westech's theory of recovery does not bear upon this separate aspect of the decision. As already explained, *supra* at 18, *Soranno's Gasco* held that the plaintiff had a cognizable due process interest but was not entitled to a ***pre***-deprivation hearing because issues of public health and safety were at stake. Here the state has not even claimed health and safety are at stake. Moreover, Westech is challenging the Ninth Circuit's determination that the delay in conducting the ***post***-deprivation hearing, which the Ninth Circuit analyzed separately in its opinion below, violated due process.

plaintiff's car was impounded] is too fact intensive to permit dismissal of this claim on the pleadings"); *Weller v. Dept. of Social Services for the City of Baltimore*, 901 F.2d 387, 393 (4th Cir. 1990) (reversing dismissal because plaintiff's "allegations, if proven, would rise to the level of a due process violation"); *cf. Jones v. City of Gary, Indiana*, 57 F.3d 1435, 1444 (7th Cir. 1995) (affirming grant of summary judgment because the delays "between [plaintiff's] suspensions and hearings were not so great, as alleged by [plaintiff], to deprive him of due process").

In this case, Westech alleged the state regulators constructively deprived it of its license and livelihood without offering any pre-deprivation hearing, without holding a post-deprivation hearing for over fourteen months, much as Westech desperately sought a prompt hearing, by which time Westech had lost its business and its license had automatically reverted. According to the Ninth Circuit, Westech failed to state a viable claim under the Due Process Clause. The Ninth Circuit reached this conclusion despite "[a]ssuming without deciding that the constructive revocation of a license . . . may violate due process."[9] (App., *infra*, 3a.) As such, the Ninth

---

[9] This is a sound assumption. Permitting government to achieve the same result without regard for proper procedure would create perverse incentives for it to effect deprivations under cover of darkness rather than through established channels. Perhaps as a result, courts have not distinguished between constructive and formal deprivations with respect to due process. *See Pierce v. Netzel*, 2000 U.S. App. LEXIS 16968 at *4-6 (2nd Cir. 2000) (treating "constructive discharge" as grounding a procedural due process claim); *Pollock v. Baxter Manor Nursing Home*, 706 F.2d 236, 241 (8th Cir. 1983) ("information released by the government about a former employee . . . will work a de facto revocation of the former employee's right to engage in his or her chosen

Circuit has minted a bright-line rule that is anathema under this Court's jurisprudence: for the Ninth Circuit, the point where over fourteen months have passed since a business was stripped of its license and livelihood, and the business has ceased to exist, categorically is not the "point [where] a delay in the post-termination hearing [has] become a constitutional violation." *Loudermill*, 470 U.S. at 547. Of course, any bright-line rule faithful to *Loudermill* would have to be just the opposite. In any event, the rule established by the Ninth Circuit creates an unsettling anomaly among the circuits, and disregards the fact-sensitive nature of the relevant inquiry.

Beyond the impact this new rule has upon precedent, it has troubling practical ramifications for businesses throughout the Ninth Circuit. Numerous businesses in regulated industries of every kind depend upon state-conferred licenses and authorizations for their livelihoods. These businesses spend enormous resources with the justifiable expectation they can maintain their status and address any compliance concerns as and if the arise without losing the business before they can be heard. It upsets the reasonable expectations of such businesses to be deprived, without notice or hearing, of the benefits, rights and status of a license and then be forced to wait well over a year, after its business has already been destroyed, before obtaining a hearing. However, if the opinion below is left to stand, such businesses will be without recourse in such circumstances. This situation demands correction by this Court.

Westech was ready, willing and able to proceed immediately with a due process hearing to try to save its license and operations before the ADHS officials' efforts

---

profession").

succeeded in completely destroying its business. When the administrative hearing was originally scheduled to begin in September 1995 (a month after the Revocation Notice issued), Westech's business had been severely damaged but not yet destroyed. A timely opportunity to respond to the charges and clear Westech's business reputation would have enabled Westech to salvage the remnant of its business.

Although Arizona law requires a prompt due process hearing, the ADHS officials delayed the start of the administrative hearing for over 14 months after their actions in August 1995 destroyed Westech's business. By May 1996, Westech's closed laboratory business was forced to sell its assets at liquidation value. Subsequently, the administrative hearing was finally begun in October 1996, long after Westech's business was already destroyed and shut down (the hearing then continued until June 1997). (App., *infra,* 28a.)

Thus, the state delayed well over a year before beginning the "due process" hearing. During that time, the full penalty of the revocation (*i.e.*, the loss of Westech's ability to operate an environmental testing laboratory as a going concern and to submit test data for compliance purposes) was unjustly imposed. That itself constitutes a separate and distinct due process violation caused by the decisions made and the actions taken and authorized by the state regulators.

Both courts below manifestly erred in holding (for different reasons) that Westech's claim was moot: either because it sold its assets in May 1996, as the district court concluded (App., *infra*, 12a), or because Westech's license "remained in force" throughout the entire period of delay, as the court of appeals imagined (App., *infra*, 3a).

Although Westech's business obviously suffered immediate damage as a result of the ADHS officials' actions, a timely hearing could have salvaged a remnant of that business before it subsequently became destroyed. However, the ADHS officials deliberately delayed the hearing until October 1996, well after Westech's environmental laboratory had been put out of business and its assets liquidated in May 1996. (App., *infra*, 28a.)

Therefore, contrary to the reasoning of the district court, Westech's claim that it should have received a due process hearing ***before*** its business was ruined by the ADHS officials' actions cannot be rendered moot, as a matter of law or logic, merely because the state officials succeeded too well in delaying the start of the hearing until ***after*** Westech's business had already been destroyed and its assets sold. Otherwise, the state could moot any such claim by a regulated business by delaying a post-deprivation hearing for such an egregiously long time that the business ceases to exist.

And contrary to the reasoning of the Ninth Circuit, Westech's license did not remain in effect during the entire period of delay. Significantly, the Ninth Circuit's opinion is internally contradictory on this point. It had to accept that the license did not remain in effect during the entire period of delay when it assumed *arguendo* that "constructive revocation of a license . . . may violate due process." (App., *infra*, 3a.) Under the facts alleged by Westech, the ADHS officials

constructively revoked Westech's license in August 1995;[10] thus, it could not have been in effect then during the entire period of delay. Certainly, by May 1996, when Westech was forced to close the laboratory business and liquidate its assets, prior to the start of the administrative hearing in October 1996, Westech's license was automatically forfeited under Arizona law. (App., *infra*, 40a.) This is what the ADHS hearing officer found at the conclusion of the administrative hearing in June 1997. The administrative revocation hearing held from October 1996 through June 1997 was totally unnecessary and meaningless because Westech's license had

---

[10] The Ninth Circuit's decision to "assume" that the constructive revocation of a state-granted license may violate due process also necessarily accepts the proposition that Westech's amended complaint stated a valid due process claim that the actions of the ADHS officials on or about August 1, 1995, violated Westech's constitutionally protected liberty interest in its business reputation under this Court's holdings in *Paul v. Davis*, 424 U.S. 693 (1976), and *Siegert v. Gilley*, 500 U.S. 226 (1991). As this Court has made clear, mere defamation injuring one's reputation, without more, does not rise to constitutional magnitude. *Paul v. Davis, supra*, at 708-09 (injury to reputation by itself is not a liberty interest protected by the Due Process Clause). However, in this case, Westech plainly alleges that the ADHS officials' defamatory statements to its customers, in addition to injuring its business reputation, directly caused the distinct alteration or extinction of Westech's previously-recognized right or status to have its test data presumptively accepted by ADEQ for compliance purposes. As the Ninth Circuit must have recognized in connection with its "assumption" that state officials may violate due process by taking actions that constructively revoke rights under a license, Westech's allegations comport with the holding of *Paul v. Davis* that the plaintiff must allege the distinct alteration or extinction of a right or status previously recognized by state law in addition to the injury inflicted to his reputation. *Id.* at 711.

automatically terminated by May 1996. Not only was Westech subjected to the unreasonable burden and expense of going through a lengthy, pointless hearing, but it suffered demonstrable prejudice to its business and property interests by the ADHS officials' deliberate delay in starting the hearing until after its business was effectively ruined.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Eric H. Zagrans
Counsel of Record
The Zagrans Law Firm
A Legal Professional Association
5338 Meadow Lane Court
Elyria, OH 44035-1469
(440) 934-7000

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 99-17293

[Filed: June 28, 2001]

WESTECH LABORATORIES, INC., *Plaintiff - Appellant*,	)
v.	)
JACK DILLENBERG, ET AL. *Defendants - Appellees*.	)

JUDGES:
HILL, ** GRABER, and McKEOWN, Circuit Judges.

Appeal from the United States District Court
for the District of Arizona. D.C.
No. CV-96-01776-RGS.
Roger G. Strand, District Judge

** The Honorable James C. Hill, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

MEMORANDUM*

Plaintiff Westech Laboratories appeals from the district court's order dismissing Westech's complaint for failure to state a claim. See Fed. R. Civ. P. 12(b)(6). We have jurisdiction pursuant to 28 U.S.C. § 1291 and we affirm.

This case is guided by the Supreme Court's decision in *Paul v. Davis,* 424 U.S. 693, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976), where the Court held that the stigmatization of a person by the government, without more, does not constitute a violation of due process. *Id.* at 711-12. This "stigma plus" test, as we have dubbed it, requires a plaintiff to demonstrate both reputational harm and "also that the state action deprived the plaintiff of a protected liberty or property interest or a status recognized by the state." *WMX Techs., Inc. v. Miller,* 197 F.3d 367, 376 (9th Cir. 1999) (en banc). So, for instance, we have held that when a business's goodwill is protected by state law as a property interest, damage to that interest may constitute an actionable "plus" in the "stigma plus" test. *Soranno's Gasco, Inc. v. Morgan,* 874 F.2d 1310, 1316 (9th Cir. 1989).

Here, Westech attempts to characterize its claim as falling within the rules established in *Paul v. Davis*, *WMX*, and *Soranno's Gasco*. Westech concedes that its license was not actually revoked, and it has affirmatively disclaimed any

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

claim based on goodwill. Rather, Westech contends, it was deprived of the essence of its license when the Arizona Department of Health Services (ADHS) informed Westech's customers that ADHS would not accept Westech test data.

This argument is unpersuasive. Assuming without deciding that the constructive revocation of a license--as opposed to actual, technical revocation--may violate due process, Westech's theory is foreclosed by *Soranno's Gasco*. Westech also argued that the state's delay in holding a license suspension hearing deprived it of the value of its license. This argument also is of no avail. See *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 547, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985). Moreover, Westech's license remained in force throughout the period at issue, so Westech was not prejudiced by any delay.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV-96-1776-PHX-RGS

[Filed: August 31, 1999]

WESTECH LABORATORIES, INC., *Plaintiff*,

v.

ARIZONA DEPARTMENT OF HEALTH SERVICES, ET AL., *Defendants*.

ORDER

I. INTRODUCTION

On July 31, 1996, Plaintiff Westech Laboratories, Inc. filed its verified complaint against Defendants Arizona Department of Health Services ("ADHS"), Office of Laboratory Licensure & Certification, Jack Dilleneberg, Director of ADHS, Roger Austin, Deputy Director of ADHS, Barbara Erickson, Laboratory Director of the Laboratory Services of ADHS, Steven D. Baker, Senior Auditor and Program Manager of the Environmental Laboratory Licensure

Section of the Office of Laboratory Licensure and Certification of the ADHS and Wynand H. Nimmo, Manager of the Office of Laboratory Licensure and Certification of the ADHS (hereinafter "Defendants") alleging claims pursuant to 42 U.S.C. § 1983 for violations of the Due Process Clause of the Fourteenth Amendment. Plaintiff's claims stem from Defendants' conduct during Plaintiff's license revocation proceedings. On November 20, 1998, Plaintiff filed a verified first amended complaint terminating Defendants Roger Austin, Wynand H. Nimmo, Office of Laboratory Licensure & Certification and Arizona Department of Health Services and adding Defendants James Griffith, Deputy Director of ADHS and James Allen, Director of ADHS. Currently pending before the Court is Defendants' Motion to Dismiss. Oral arguments were heard on June 14, 1999 at which time the Court took the matter under advisement. After having considered the issues raised by the parties, the Court finds that Westech's complaint fails to state a due process claim; accordingly, the Court will grant Defendants' Motion to Dismiss.

II. BACKGROUND

Westech is a Delaware corporation incorporated in October, 1990 and having its principal place of business in Phoenix. (Doc. 16 at ¶1). Westech was a licensed "environmental testing laboratory" engaged in the business of analyzing environmental compliance samples. (*Id.*) In September, 1994, ADHS's office of Laboratory Licensure and Certification began an audit of Westech. (Doc. 16 at ¶15). Shortly after ADHS began its audit, Defendant Baker informed Westech that "major problems" were found. Westech contends that Baker refused to give specific details

relating to the "major problems" but demanded that Westech immediately discontinue accepting drinking water samples for testing. (*Id.*) Consequently, Westech immediately ceased accepting drinking water samples for testing. (*Id.*) Additionally, Westech contends that it implemented a massive, in-house review of quality assurance/quality control policies and sought to revamp its testing procedures. *(Id.* at ¶17). Westech alleges that as a result of communications from Defendants, the Arizona Department of Administration suspended Westech's contract work and stopped paying Westech and for several weeks stopped paying Westech's sister companies. (*Id.* at ¶16).

On December 2, 1994, Baker provided Westech with a written statement setting forth the alleged deficiencies that were uncovered during the September, 1994 audit. (*Id.* at ¶17). On December 21, 1994, Westech responded to Baker's December 2, 1994 letter and explained the measures it had implemented in response to the "problems" uncovered during the ADHS September, 1994 audit. (*Id.*) Prior to ADHS' issuance of its December 2, 1994 letter, in November, 1994, ADHS again audited Westech. By letter dated December 21, 1994, Baker informed Westech that the second audit uncovered additional deficiencies as set forth in his letter. (*Id.* at ¶18). In a letter dated January 11, 1995, Westech responded to Baker's letter by answering the various allegations and seeking approval of the measures it had implemented in an effort to correct the deficiencies. *(Id.)*

Without response to Westech's December 21, 1994 letter and prior to receiving Westech's January 11, 1995 letter, on January 9, 1995, Defendant Dillenberg issued a "Notice of Suspension of Regular License and Intent to Issue

Provisional License." (Doc. 16 at ¶19). Dillenberg's Notice of Suspension indicated his intention to place Westech under a provisional license containing special restrictions and conditions.[1] (*Id.*) Thereafter, on January 13, 1995, Westech agreed in writing to comply with the special restrictions and limitations of the provisional license. (Doc. 16 at ¶21). Westech was given until October, 1995 to correct the alleged deficiencies in its testing procedures. (*Id.*)

The hearing on the Notice of Suspension was repeatedly continued at the joint request of Defendants and Westech since both parties, beginning in March, 1995, were attempting to settle the issues raised by the Notice of Suspension. (Doc. 16 at ¶25). However, in May, 1995, Westech learned that one of its tests conducted in December, 1994 and submitted to the Arizona Department of Environment Quality ("ADEQ") was being questioned. (*Id.* at ¶26). Mary Simmerer of the ADEQ requested that Defendants and the criminal division of Arizona's Attorney Generals Office investigate the December, 1994 test result. (*Id.*) Subsequently, in June, 1995, Defendants initiated an investigation. (*Id.*)

Despite the parties continuing efforts to settle the disputes raised by the Notice of Suspension, on August 1, 1995, Defendant Dillenberg issued a "Notice of Intent to Revoke Regular License" indicating Defendants' intentions to permanently revoke Westech's license. (*Id.* at ¶29). Westech

---

[1] Westech alleges that despite having been promised the provisional license, Defendants, without notice to Westech, decided not to issue the provisional license to it. (Doc. 16 at ¶23).

requested 72 hours to investigate and respond to the allegations raised in the notice. However, Defendants refused Westech's request. Thereafter, Defendants issued a press release relating to its notice to Westech of its intent to revoke regular license. (*Id.* at ¶32). Defendants' press release and alleged other comments to the media caused newspapers of major circulation in Arizona to carry headlines such as "Water Test Lab Closed" and "Water-Testing Lab Loses License." (*Id.*). Additionally, Westech contends that Defendants immediately communicated with Westech's customer base of sister state agencies and various municipal and local governments in an effort to dissuade them from doing business with Westech. (*Id.* at ¶33).

III. DISCUSSION

A. Standard of Review

Dismissal for failure to state a claim is proper only if it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations. *Cervantes v. City* of *San Diego,* 5 F.3d 1273, 1274 (1993). All allegations of material facts are taken as true and construed in the light most favorable to the plaintiff. *Love v. United States,* 915 F.2d 1242, 1245 (9th Cir. 1989). "The issue is not whether a plaintiff will ultimately prevail but whether [he] is entitled to offer evidence to support his claim." *Cervantes,* 5 F.3d at 1274.

B. Analysis

In their Motion to Dismiss, Defendants contend that Westech's § 1983 action must be dismissed since Westech

fails to allege a constitutionally recognized property interest. Moreover, with respect to the individually named Defendants, Defendants contend that Westech's claim must be dismissed since (1) Westech fails to allege the personal participation of either Defendants Barbara Erickson or James Griffith; (2) to the extent that Westech sets forth allegation relating to the conduct of Jack Dillenberg and Steven Baker, such allegations are insufficient to state a constitutional claim against them in their personal capacity and (3) alternatively, Defendants are entitled to qualified immunity. Lastly, Defendants contend that the Court must dismiss Westech's claim for equitable relief since there no longer exists a case or controversy.

In order for Westech to make out a cause of action under § 1983, it must plead that "(1) the defendants acting under color of state law (2) deprived [it] of rights secured by the Constitution or federal statutes." *Gibson v. United States,* 781 F.2d 1334, 1338 (9th Cir.1986). Furthermore, in order for Westech to properly allege that Defendants deprived it of his Fourteenth Amendment due process rights, Westech must allege that a constructionally protected property interest is at stake. *Board of Regents v. Roth,* 92 S.Ct.2701, 2705 (1972).

Westech first alleges that Defendants violated its due process rights by falsely accusing it of intentionally falsifying test results. Westech alleges that Defendants' accusations deprived it of its interest in its business reputation and goodwill. In *Paul v. Davis*, 96 S.Ct. 1155 (1976), the Supreme Court addressed the issue whether a police chief's distribution of a flyer which included the plaintiff's name and a photograph with the caption "Active Shoplifters" implicated the plaintiff's "liberty" or "property" interests sufficient to invoke the procedural protections of the due process clause of

the Fourteenth Amendment. After an exhaustive analysis of Supreme Court precedent, the *Paul* Court rejected the plaintiff's claim, finding that injury to reputation by itself was not a "liberty" interest protected under the Fourteenth Amendment. *Id.* at 1164. Rather, the *Paul* Court held that in order for the plaintiff to invoke the procedural protections of the Due Process clause, he must allege, in addition to the stigma inflicted to his own reputation, the distinct alteration or extinction of a previously recognized right or status. *Id.* at 1165.

Moreover, in *WMX Tech., Inc. v. Miller,* 80 F.3d 1315 (9th Cir.1996), the Ninth Circuit addressed the issue whether the plaintiff corporation's allegations that the defendant's dissemination of a report linking the plaintiff to organized crime caused injury to its business reputation or goodwill satisfied the requirement that a constitutionally protected property or liberty interest be at stake. Applying the holding set forth in the *Paul* case that damage to one's reputation without more does not rise to the level of a constitutionally protected interest and finding that the plaintiff's claim involved only defamatory remarks made to the public generally which allegedly caused injury to the plaintiff's business reputation, the *WMX Tech.* court concluded that the plaintiff failed to satisfy the requirement that a constitutionally protected property interest be at stake. *WMX Tech.*, 80 F.3d at 1319.

Despite the fact that the Ninth Circuit, after agreeing to hear the case *en banc,* determined that it lacked jurisdiction to consider the substantive issues raised in the initial appeal, *see WMX Tech., Inc. v. Miller,* 104 F.3d 1133 (9th Cir.1997), the Court concludes that the portions of the *WMX Tech.*

opinion cited above remain a persuasive indication of the Ninth Circuit's position on the issues raised in the present case. Thus, applying the reasoning from the *WMX Tech.* case, since Westech's complaint alleges that "Defendants' conduct deprived Westech of its ability to do business as a practical matter, without a due process hearing" and that "[t]he actions of Defendants, and each of them, abruptly ended Westech's ability to market and sell its services to its customers and destroyed it as a going concern" (*see* doc. 16 at ¶40), the Court finds that Westech is merely alleging an injury to its business reputation which is not sufficient to satisfy the requirement that a protected property interest be at stake.

Westech also alleges that Defendants violated its Fourteenth Amendment rights by depriving Westech of the right to engage in its business, i.e. that Defendants conduct was the functional equivalent of revoking its business license, without due process of law. In support of its contention, Westech cites *Chalkboard, Inc. v. Brandt,* 902 F.2d 1375. In *Chalkboard,* the court addressed whether the defendants summary suspension of the plaintiff's license to operate a day care center violated the plaintiff's right to due process. In *Chalkboard,* defendants did not dispute that the day care facility had a property interest in its business license, nor did the defendants dispute that it had deprived the day care facility of that property interest by summarily suspending Chalkboard's business license. Consequently, the Court finds the *Chalkboard* case distinguishable from the facts of the present case since it is uncontested that Defendants did not deprive Westech of its business license summarily or otherwise. Other than the *Chalkboard* case which the Court distinguishes from the present case, Westech fails to set forth any legal authority for its proposition that Defendants

deprived Westech of its due process rights by, *in effect*, suspending its business license.

Additionally, in its response to Defendants' Motion to Dismiss, Westech raises the contention that Defendants' revocation of Westech's allegedly "promised" provisional license constitutes a deprivation of a property interest without due process of law. However, Westech fails to set forth any legal authority for its contention that Defendant Dillenberg's alleged promise to grant Westech a provisional remedy until October, 1995 created a constitutionally recognized property interest.

Lastly, in its response to Defendants' Motion to Dismiss, Westech also alleges that Defendants' delay in beginning its revocation hearing denied Westech's due process rights. Westech's complaint alleges that the administrative hearing on the notice of revocation was originally scheduled for September, 1995, one month after ADHS issues its notice of revocation. (Doc. 16 at ¶34). But, since ADHS wanted to include matters pertaining to the 1994 audit and since ADHS issues a First Amended Notice of Intent to Revoke Regular License, referencing "newly discovered evidence," the September, 1995 hearing was delayed. (*Id.*)

Notwithstanding Westech's allegations that Defendants' "needlessly delayed" the hearing (see doc. 16 at ¶34), Westech also alleges that "Westech was destroyed as a viable going concern as a direct and proximate result of the actions of the individual Defendants within a short time after the Revocation Notice in August 1995. Westech sold its laboratory assets in May, 1996." Westech goes on to allege that "[t]hus, as of May, 1996, the license revocation goal of

Defendants was moot." The Court finds that based on Westech's own allegations set forth in its complaint, its claim that Defendants violated its due process rights by delaying the revocation hearing until October, 1996 was moot following Westech's sale of its laboratory assets in May, 1996.

Therefore, for the reasons set forth above, the Court finds that Westech fails to allege that Defendants' deprived it of a protected interest without due process of law and, additionally, that Westech's allegation that Defendant's violated its due process rights by needlessly delaying the revocation hearing is moot. Accordingly, the Court will grant Defendants' motion to dismiss for failure to state a claim.

IT IS SO ORDERED granting Defendants' Motion to Dismiss (Doc. #18).

IT IS FURTHER ORDERED that the Clerk of the Court shall dismiss this action.

DATED this 27th day of AUGUST, 1999.

/s/
HONORABLE ROGER G. STRAND
U.S. DISTRICT COURT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV-96-1776-PHX-RGS

[Filed: August 31, 1999]

WESTECH LABORATORIES, INC., *Plaintiff,*	)
v.	)
ARIZONA DEPARTMENT OF HEALTH SERVICES, ET AL., *Defendants.*	)

JUDGMENT IN A CIVIL CASE

____ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__XX__ **Decision by Court**. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants' Motion to Dismiss having been granted, that

plaintiff take nothing and the complaint and action are hereby dismissed.

DATED at Phoenix, Arizona, this 31st day of August, 1999.

RICHARD H. WEARE
Clerk of Court/DCE

/s/
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV-96-1776-PHX-RGS

[Filed: September 29, 1999]

WESTECH LABORATORIES, INC., *Plaintiff,*	)
v.	)
JACK DILLENBERG, et al., *Defendants.*	)

PLAINTIFF'S NOTICE OF APPEAL

Notice is hereby given, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure, that Plaintiff, Westech Laboratories, Inc., hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered by the United States District Court for the District of Arizona on August 31, 1999 (Doc. #43), granting Defendants' motion to dismiss (Doc. #18) and dismissing the complaint and this action with prejudice.

Respectfully submitted this 29th day of September, 1999.

THE ZAGRANS LAW FIRM
and
WTI, INC. Office of the General Counsel

By: /s/
Jeffrey R. Parker (006939)
One of the Attorneys for Plaintiff

Copy of the foregoing mailed this 29th day of September, 1999, to:

JANET NAPOLITANO
Attorney General for the State of Arizona
MICHAEL G. PROST (004360)
Assistant Attorney General
Liability Management Section
1275 West Washington Street
Phoenix, Arizona 85007-2997
Attorney for Defendants

By: /s/
One of the Attorneys for Plaintiff

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV-96-1776-PHX-RGS

[Filed: November 20, 1998]

WESTECH LABORATORIES, INC., *Plaintiff*,	)
v.	)
JACK DILLENBERG, et al., *Defendants*.	)

VERIFIED FIRST AMENDED AND SUPPLEMENTAL COMPLAINT FOR MONEY DAMAGES AND FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, Westech Laboratories, Inc. ("Westech"), for its Verified First Amended and Supplemental Complaint against Defendants Jack Dillenberg, Barbara Erickson, Steven D. Baker, and James Griffith, and each of them, jointly and severally, in their respective individual capacities, together with the communities comprised of said Defendants and their respective spouses, if any, and in all Defendants,' including Defendant James R. Allen's, respective official capacities as

current and former state officers with the Arizona Department of Health Services and its Office of Laboratory Licensure & Certification (collectively "ADHS"), hereby claims, alleges, states and avers as follows:

I.

THE PARTIES

1. Westech is a Delaware corporation having its principal place of business at 3737 East Broadway Road, Phoenix, Maricopa County, Arizona. At all times material to this litigation, Westech held a license to operate as an "environmental testing laboratory" in Phoenix, Arizona, issued by ADHS.

2. Defendant, Jack Dilleneberg ("Dilleneberg"), was at all times material hereto the Director of ADHS, a department or agency of the State of Arizona duly organized under Arizona law.

3. Defendant, Barbara Erickson ("Erickson"), is at all times material hereto the Laboratory Director for State Laboratory Services of ADHS.

4. Defendant, Steven D. Baker ("Baker") , is at all times material hereto the Senior Auditor and Program Manager of the Environmental Laboratory Licensure Section of the Office of Laboratory Licensure and Certification of ADHS.

5. Defendant, James Griffith ("Griffith"), is at

all times material hereto the Deputy Director or Acting Director of ADHS.

6. Defendant, James R. Allen ("Allen") , is the current Director of ADHS.

7. With the exception of Defendant Allen, all actions committed by the individual Defendants herein were undertaken on behalf of each such Defendant individually, and on behalf of the marital communities comprised of each individual Defendant and his or her respective spouse, if any, jointly and severally. The names of the individual Defendants' spouses, if any, are presently unknown to Westech and will be substituted by amendment when discovered.

II.

NATURE OF ACTION, JURISDICTION AND VENUE

8. This is a civil rights action arising under the provisions of 42 U.S.C. § 1983 and 28 U.S.C. § 2201 and 2202, seeking money damages and declaratory and injunctive relief to redress Defendants' deprivation, under color of law, of rights, privileges and immunities secured to Westech by the Constitution and laws of the United States, including without limitation rights secured to Westech by the Fourteenth Amendment to the Constitution.

9. This Court has subject matter jurisdiction over the federal questions presented by this controversy, pursuant to 28 U.S.C.§§ 1331, 1343(a)(3), 2201 and 2202. Notwithstanding the lack of a jurisdictional amount in controversy requirement for the Court's federal question jurisdiction, there exists between the parties an actual

controversy, justiciable in nature, in which the amount in controversy exceeds the sum of $75,000 exclusive of interest and costs.

10. This Court has jurisdiction over the persons of the Defendants, and each of them, all of whom reside in Arizona within this judicial district.

11. Venue is proper in this judicial district, pursuant to 28 U.S.C.§ 1391, because all Defendants reside within the District and because it is the judicial district within which a substantial part of the events giving rise to the claims for relief occurred.

III.

FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF

12. Without affording Westech a prior hearing or due process, the actions of the individual Defendants herein have deprived Westech of its ability to analyze environmental compliance samples for its customers, and thereby have destroyed Westech's existing business and ability to do business in the future.

13. Westech had prospered as a full-service environmental testing laboratory from its inception in October 1990 until its September 1994 audit by ADHS personnel. Over those four years, the laboratory operations were regularly audited by several different regulatory agencies and a number of privately-retained auditors. During those years, Westech's Phoenix laboratory successfully passed at least four

audits annually. By means of such successful audits, Westech gained certification or "approved" status from national programs such as the U.S. Army Corps of Engineers, the States of California, Nevada, Colorado and Utah, Chevron Oil Company, El Paso Natural Gas Company, Allied Signal, Woodward Clyde and the State of Arizona.

14. The field of environmental analytical testing has undergone rapid technological advances. Given the increasing complexity in this area, Westech's predecessor, along with nearly the entire laboratory testing industry in Arizona, supported new legislation for laboratory licensure in 1989 that would enable the State to regulate and sanction environmental testing laboratories. The goal of the legislation was to help assure quality analytical testing services to the people of Arizona. Westech personnel served actively on the advisory committee that assisted in implementing the new legislation.

15. Against this record of Westech's successful audits and compliance, industry leadership and rapidly changing technology, ADHS's Office of Laboratory Licensure and Certification began to audit Westech in September 1994. Within hours of its commencement, Baker informed Westech's laboratory director that "major problems" had been found. He refused to provide specifics or details, but demanded that Westech immediately discontinue accepting drinking water samples for organics testing at Westech. Westech had no prior knowledge of any testing deficiencies, nor was it informed of any by Baker, but Westech immediately and voluntarily complied with Baker's demands and stopped accepting drinking water samples for such testing.

16. Based upon communications from Defendants, the Arizona Department of Administration suspended Westech contract work, stopped paying Westech and for several weeks stopped paying Westech's sister companies.

17. Baker finally gave Westech a written statement dated December 2, 1994, of the deficiencies allegedly uncovered during the audit that began in September 1994. In response to the allegations, Westech immediately began a massive, in-house review of quality assurance/quality control policies and undertook to revamp its testing procedures and methodologies in order to place its quality systems beyond any question or criticism. On or about December 21, 1994, Westech responded in writing to Baker's allegations, explaining the measures that were being implemented and requesting approval of such measures.

18. Personnel from the Office of Laboratory Licensure and Certification again audited Westech's Phoenix laboratory on November 22-23, 1994. By letter dated December 21, 1994, Baker informed Westech that the second audit had discovered the additional alleged deficiencies set forth in his letter. On January 11, 1995, Westech submitted a detailed written response to the second statement of alleged deficiencies, answering the various allegations and again seeking approval of the steps Westech had implemented.

19. Without replying to Westech's December 21, 1994 letter, and before receiving Westech's response to Baker's second letter, Dillenberg issued a "Notice of Suspension of Regular License and Intent to Issue Provisional License" (the "Suspension Notice") on or about January 9, 1995. The Suspension Notice reflected Dillenberg's intention

and desire to place Westech under a provisional license containing certain special restrictions and conditions.

20. ADHS issued a news release on January 11, 1995 in which Dillenberg is quoted as stating, "I anticipate that Westech, with the department's guidance, will correct the deficiencies and remain a viable testing laboratory in the state," and "Westech's owners have demonstrated a willingness to cooperate."

21. On or about January 13, 1995, Westech agreed in writing to abide by the special conditions and limitations of the provisional license. No administrative hearing on the Suspension Notice was ever held, and Westech voluntarily continued to operate in accordance with the conditions and limitations of the provisional license agreement to which it had agreed, and Westech in good faith relied upon said provisional license's issuance. Westech was given until October 1995 to correct and eliminate the alleged deficiencies in its testing programs.

22. Baker sent an ADHS auditor, Zhikui Chian, to Westech on January 13, 1995 to do a "walk through" of one of its licensed test methodologies as performed by a Westech analyst. After Mr. Chian's favorable review, Westech was cleared to continue drinking water testing.

23. Without informing Westech, Defendants decided not to deliver the provisional license that had been signed by Dillenberg and promised to Westech. Defendants did not "issue" the provisional license to Westech in conformity with Department regulation R9-14-604(E).

24. Westech voluntarily operated in compliance with the special conditions and limitations demanded by Defendants and, in reasonable reliance upon its agreement to accept the conditions imposed by Defendants under the terms of the document it signed on January 13, 1995, Westech invested more than $750,000 for auditors, consultants, additional professionals, equipment and materials, and devoted thousands of hours of labor in the design and implementation of its restructured and upgraded quality assurance and quality control systems.

25. The hearing on the Suspension Notice was postponed several times at the joint request of ADHS and Westech because of the parties' negotiations, beginning in March 1995, to settle the entire controversy raised by the Suspension Notice. During this period, Westech's testing was approved pursuant to a series of proficiency evaluations conducted by third parties to the satisfaction of Defendants. Also during this time, Baker signed several letters to Westech announcing his approval of Westech's proficiency in several testing methods.

26. In May 1995, Westech learned that one of its tests conducted in December 1994 and submitted to the Arizona Department of Environmental Quality ["ADEQ"] was being questioned. Westech investigated and immediately discovered a reporting error. ADEQ was advised that a discarded test had inadvertently been reported instead of the retest. However, without communicating with Westech, Mary Simmerer of the ADEQ separately requested Defendants and the criminal division of the Arizona Attorney General's Office to investigate the December 1994 test result, when she knew

or should have known that the original report had simply reported a discarded test result.

27. In January 1995, stating only that a complaint had been filed, Defendants conducted a narrow and superficial investigation of Westech by reviewing select data from a single test method and lab analyst, both of which Baker had approved following the "walk through" conducted on January 13, 1995. ADHS reported to Westech representatives shortly after this investigation that "we are not seeing any serious problems." On or about June 21, 1995, Westech submitted to ADHS a draft of a proposed consent agreement that would settle the entire Suspension Notice. At a meeting between the parties on June 26, 1995, ADHS counsel told Westech representatives that the settlement discussions should continue because the recent ADHS investigation had found no serious compliance problems, and suggested several revisions to the draft consent agreement. Westech thereafter incorporated the ADHS suggestions into a revised consent agreement and faxed it toADHS on or about July 5, 1995. Westech did not hear from Defendants again until their "surprise attack" on August 1, 1995.

28. Pursuant to discussions with Dillenberg and the terms of the provisional agreement, Westech initiated a third party audit on July 18, 1995 of its entire laboratory by an auditor whose qualifications were discussed with Baker in advance. The auditor later told ADHS, based upon his criteria of comparison to EPA laboratories, that Westech "passed with flying colors."

29. On or about August 1, 1995, Dillenberg issued

a Notice of Intent to Revoke Regular License (the "Revocation Notice"), without any prior warning to Westech. The Revocation Notice announced Defendants' intentions and desire to revoke permanently Westech's license, which was the regulatory equivalent of the death penalty for Westech's business.

30. The results of the June 1995 investigation served as ADHS's purported basis for dispensing with the provisional agreement and seeking revocation of Westech's license. Approximately eight data packets from the investigation were included in the Revocation Notice, half of which were performed before the provisional licensure period agreed to by the Department had even commenced and before the ADHS "walk-through" approval of the test method and analyst in question.

31. None of deficiencies alleged in these packets were evaluated by ADHS for materiality. The Defendants did not review the third party audit, did not seek clarification from either the analyst or Westech, did not notice that a significant portion of the criticized data was not even used by Westech, and did not conduct an audit of the other 200+ test methods Westech was licensed to perform.

32. Stunned by the August 1, 1995 Revocation Notice after having been informed in June and July that ADHS was finding no major problems, Westech requested 72 hours within which to investigate and respond to the allegations in the Notice. Defendants refused Westech's request and, without waiting for an evidentiary hearing to determine whether the charges against Westech were true, and without thereby affording Westech due process of law,

immediately issued a devastating press release that was, and was intended to be, widely reported by newspapers and other media around the State. Defendants' press release and other comments to the media caused newspapers of major circulation throughout Arizona to carry headlines such as "Water Test Lab Closed" (Scottsdale Daily Progress, August 3, 1995) and "Water-Testing Lab Loses License" (Tempe Tribune, August 4, 1995). The Arizona Republic carried the report as a front-page story on August 3, 1995.

33. In addition, Defendants promptly notified and communicated with Westech's customer base of sister state agencies and various municipal and local governments in an effort to make it impossible for any regulated entity to do business with Westech. Westech's sole business was the testing of compliance samples, which are submitted for environmental compliance purposes. The intended and accomplished effect of Defendants' pre-hearing communications to Westech's customers and to the public at large was to create and foster the belief of the presumptive invalidity of Westech's data and compliance testing. Some of Westech's testing data was rejected by at least one other state agency based solely upon the communications and information received from ADHS and the individual Defendants.

34. A.R.S.§ 36-495.09(C) requires Dillenberg "not [to] suspend, revoke or deny a license without affording the licensee notice and an opportunity for a hearing". The administrative hearing on the Revocation Notice was originally scheduled for September 5, 1995. Westech declared that it was prepared to go to hearing as scheduled. However, Defendants demanded that the hearing include matters from the 1994 audit. Furthermore, on or about August 25, 1995,

ADHS issued a First Amended Notice of Intent to Revoke Regular License, purporting to include so-called "newly discovered evidence." As a result of Defendants' strategic maneuvers, the hearing was needlessly delayed.

35. Westech was destroyed as a viable going concern as a direct and proximate result of the actions of the individual Defendants within a short time after the Revocation Notice in August 1995. Westech sold its laboratory assets in May 1996. Thus, as of May, 1996, the license revocation goal of Defendants was moot.

36. Nevertheless, Defendants held needless hearings on the mooted license commencing in October 1996 and lasting until June 1997 to the substantial expense, damage and detriment of Westech.

37. In August, 1997 the Hearing Officer rendered a 72-page decision containing Recommended Findings of Fact and Conclusions of Law. The Hearing Officer found "Based upon the Findings of Fact and Conclusions of Law attached hereto, the Department's claim for revocation of Westech's regular license should be denied. Moreover, based on the facts in Sections 14-38 of the Findings of Fact, the Hearing Officer concludes that revocation would be inappropriate based upon any facts the Department may submit occurred during the Phase II period (i.e. the period covered by the 1994 audit)."

38. The Hearing Officer found that "The (ADHS) Sanctions Policy confirms the intent of ADHS to allow laboratories that are charged with deficiencies a reasonable opportunity to correct those deficiencies..." He stated that

"the numerous steps taken by Westech in response to the Fall 1994 audits and to the resulting deficiencies identified by ADHS, demonstrate a commitment by Westech management to address those deficiencies and improve data quality significantly. These efforts further demonstrate that Westech management was not knowingly aiding, permitting or abetting the submission of false or inaccurate data at any time."

39. After several unexplained and unjustified delays, Defendant Griffith's subordinate David Borg in January 1998 issued a proposed Final Decision completely at odds with the detailed findings of the Hearing Officer, including the Hearing Officer's determinations of witness credibility. The proposed Final Decision states that the entire matter was mooted by Westech's cessation of its business, which resulted in the license reverting to the ADHS as a matter of law. Westech has requested reconsideration of the proposed Final Decision. Reconsideration is pending.

40. Defendants' conduct deprived Westech of its ability to do business as a practical matter, without a due process hearing. The actions of Defendants, and each of them, abruptly ended Westech's ability to market and sell its services to its customers and destroyed it as a going concern. Defendants' actions also damaged Westech by virtue of Westech's expenditures for restructured and upgraded quality assurance and quality control systems, and by virtue of the fees and costs paid by Westech associated with the unnecessary and improper administrative hearing. Defendants' actions deprived Westech of its property and property interests without due process of law.

IV

FIRST CLAIM FOR RELIEF

(Claim for Due Process Violations Against Dillenberg, Erickson, Baker, and Griffith, Jointly and Severally, in their Individual Capacities)

41. Westech realleges and incorporates by reference each and every allegation set forth in Paragraphs 1 through 40, inclusive, above as if the same were fully rewritten herein.

42. The actions of Dillenberg, Erickson, Baker, and Griffith, individually, and each of them, jointly and severally, constitute the deprivation of Westech's property and property interests without due process of law, in violation of its rights secured by the Fourteenth Amendment to the Constitution of the United States.

43. As a direct and proximate result of the constitutional violations committed by Dillenberg, Erickson, Baker, and Griffith, individually, and each of them, jointly and severally, Westech has suffered damages in the expenditure of over $750,000 for auditors, consultants, additional professionals, equipment and materials, and thousands of hours of labor in designing and implementing its restructured and upgraded quality assurance and quality control systems, in reasonable reliance upon such Defendants' assurances that they were giving Westech until October 1995 to correct any alleged problems, and in the loss and destruction of Westech as a going concern and its business, valued before the events described herein at over $2,000,000;

and approximately $1,000,000 in fees and costs associated with the unnecessary and improper administrative hearing and related proceedings. In the Spring of 1996, Westech sold its remaining laboratory equipment for its net liquidation value of approximately $292,000.

44. The actions of said Defendants, and each of them, were committed intentionally to deprive Westech of its property without due process of law, or with reckless or callous indifference to Westech's constitutionally-protected rights, thereby entitling Westech to an award of punitive damages against said Defendants, jointly and severally.

45. As a direct and proximate result of the unconstitutional actions alleged herein, Westech was obliged to incur substantial legal fees and expenses in bringing this action to redress the deprivation of its due process rights.

46. Westech is entitled to the payment of its attorneys' fees and expenses incurred in this action, pursuant to the provisions of the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988, by said Defendants, jointly and severally.

V.

SECOND CLAIM FOR RELIEF

(Claim for Declaratory and Permanent Injunctive Relief Against All Defendants in their Official Capacities)

47. Westech realleges and incorporates by reference each and every allegation set forth in Paragraphs 1

through 46, inclusive, above as if the same were fully rewritten herein.

48. Westech seeks a declaration from the Court that the conduct of Defendants Dillenberg, Erickson, Baker, and Griffith, and each of them, as alleged herein constitutes a violation, under color of law, of Westech's rights to be free from the deprivation of its property without due process of law, as secured by the Fourteenth Amendment to the Constitution of the United States.

49. On information and belief, all Defendants herein intend to, may or will subject Westech, its affiliates and their officers, directors and/or shareholders to further sanctions, penalties or deprivations without due process of law, thereby inflicting suffering, extreme hardship and irreparable injury to their business or pecuniary interests and to their reputations, and Westech seeks permanent injunctive relief against same.

50. Westech would have no plain, speedy, adequate or complete remedy at law for any such actions, and this claim for declaratory and permanent injunctive relief is Westech's only means for securing adequate prospective relief against any such future harm.

51. Westech is entitled to the payment of its attorneys' fees and expenses incurred in this action, pursuant to the provisions of the Civil Rights Attorneys' Fees Awards Act of 1976,42 U.S.C. § 1988, by said Defendants, jointly and severally.

WHEREFORE, Plaintiff, Westech Laboratories, Inc., hereby demands judgment against Defendants Jack Dillenberg, Barbara Erickson, Steven D. Baker, and James Griffith, and each of them, jointly and severally, in their respective individual capacities, together with the communities comprised of each of them and their respective spouses, if any, and, along with Defendant James Allen, in their respective official capacities with ADHS, as follows:

A. with respect to the First Claim for Relief, for compensatory damages in an amount in excess of $3,000,000 to be proven at trial, for statutory attorney's fees and costs, and for punitive damages in an amount to be proven at trial, against Dillenberg, Erickson, Baker, and Griffith, in their individual capacities, and each of them, together with the communities comprised of each of them and their respective spouses, if any, jointly and severally;

B. with respect to the Second Claim for Relief, for a declaratory judgment that the conduct of Defendants, and each of them, has violated Plaintiff's constitutional rights, for an order permanently enjoining Defendants in their official capacities from imposing further unconstitutional sanctions, penalties or deprivations upon Plaintiff, its affiliates and their officers, directors and/or shareholders in the future, and for a statutory award from all Defendants of Westech's attorneys' fees and costs incurred herein;

C. for interest on the foregoing amounts at the highest legal rate from and after August 1, 1995 until paid;

D. for the costs of this action, pursuant to Rule 54 (d) of the Federal Rules of Civil Procedure; and

E. for such other and further relief as the Court may deem just and proper.

DATED: November 20, 1998.

THE ZAGRANS LAW FIRM
and
WTI, INC. Office of the General Counsel

By /s/
Jeffrey R. Parker (006939)
Attorneys for Plaintiff

JURY DEMAND

Plaintiff, Westech Laboratories, Inc., hereby demands a trial by jury, pursuant to Rule 38 of the Federal Rules of Civil Procedure, on all issues so triable.

DATED: November 20, 1998.

/s/
Jeffrey R. Parker (006939)
Attorneys for Plaintiff

VERIFICATION

STATE OF ARIZONA)
) ss.
County of Maricopa)

James E. Warne, III, being first sworn, states that he is President of Westech Laboratories, Inc.; that he is authorized to make this Verification on its behalf; that the foregoing First Amended and Supplemental Complaint is true to the best of his knowledge, information, and belief as to those matters within his personal knowledge; and that as to matters outside his personal knowledge, he believes them to be true.

DATED November 29th, 1998

/s/
James E. Warne III

SUBSCRIBED AND SWORN TO BEFORE ME this 20th day of November, 1998, by James E. Warne, III, President of Westech Laboratories, Inc., being authorized to do so.

/s/
Gwenolyn F. Tatum
Notary Public
Comm. Expires 05/06/02

APPENDIX F

ARIZONA SUPERIOR COURT
MARICOPA COUNTY

CASE NO. CV 1999-22982

The State of Arizona, ex rel. the Arizona Department of Health Services and Dr. James Shamadan in his official capacity as Acting Director, *Plaintiff*	)
v.	)
Timothy Barnes, in his official capacity as a Contract Hearing Officer; Michael G. English and Westech Laboratories, Inc., an Arizona corporation, and real party in interest, *Defendants*.	)

PROPOSED FORM OF JUDGMENT

This matter having come on for hearing on August 11, 2000 on Plaintiff Arizona Department of Health Services' Appeal of the Decision of the Administrative Hearing Officer dated November 22, 1999, which awarded Defendant Westech Laboratories, Inc., $562,628.98 in attorney's fees and costs, and the Court having reviewed and considered the

parties' respective Briefs, the supplemental appendices and documents of the parties, the entire voluminous administrative record and arguments of counsel,

THE COURT HEREBY FINDS that the Hearing officer's Decision with respect to attorney's fees and costs is supported by substantial evidence, is not contrary to law, is not arbitrary and capricious, and does not constitute an abuse of discretion.

IT IS HEREBY ORDERED, ADJUDGE AND DECREED that judgment on the Hearing Officer's Decision is entered as follows:

1. That the appeal of the Hearing Officer's Decision is hereby denied;

2. That the Hearing Officer's Decision awarding Westech Laboratories, Inc. attorney's fees and costs in the amount of $562,628.98 is affirmed;

3. That the Hearing Officer's Decision is [not] amended to include additional attorney's fees incurred by Westech in connection with the Fee Application in the amount of $14,518.00 for a total of $577,146.98.

4. That Westech Laboratories, Inc. is entitled to payment from the State of Arizona ex rel. the Arizona Department of Health Services in the amount ~~$577,146.98~~ $562,628.98, together with statutory interest thereon calculated at the rate of 10% as follows:

a. On $545,128.98 from June 25, 1999 through November 22, 1999; and

b. On ~~$577,140.98~~ $562,628.98 from November 23, 1999 through the date of entry of this Judgment.

5. That Westech Laboratories Inc. is awarded its attorney's fees and costs incurred in connection with this appeal in the amount of $12,500.00.

6. After entry of this Judgment, statutory interest at the rate of 10% shall accrue on the total amount of this Judgment until paid.

7. The Court finds that there is no just reason for delay and directs entry of this Judgment.

DONE IN OPEN COURT THIS 31st day of October 2000.

/s/ Norman J. Davis
Judge of the Superior Court

APPENDIX G

ARIZONA REVISED CODE SECTIONS

AND

ARIZONA ADMINISTRATIVE CODE SECTIONS

TITLE 36. PUBLIC HEALTH AND SAFETY
CHAPTER 4.3. ENVIRONMENTAL LABORATORIES
ARTICLE 1. GENERAL PROVISIONS
A.R.S. § 36-495 (1995)

§ 36-495. Definitions

In this chapter, unless the context otherwise requires:

1. "Compliance testing" means laboratory analysis of any matter, pollutant, contaminant, hazardous substance or other substance subject to regulation pursuant to:

(a) Title 49 or rules adopted or enforced by the department of environmental quality for the purpose of determining compliance with title 49.

(b) Federal environmental statutes or regulations administered or enforced by the United States environmental protection agency relating to the safe drinking water act (42 United states

code sections 300F through 300j), the clean air act (42 United States code sections 7401 through 7642), the clean water act (33 United States code sections 1251 through 1376), the resource conservation and recovery act (42 United States code sections 6921 through 6939B), the comprehensive environmental response, compensation, and liability act (42 United States code sections 9601 through 9657) and the toxic substance control act (42 United States code sections 2601 through 2654) as they relate only to the regulation of polychlorinated biphenyls and asbestos.

(c) Federal or state statutes and rules relating to the safety, contamination and sanitation of drinking water sold in bottles, or ice or water sold by machine or hauled and enforced by the department of health services or the United States food and drug administration.

2. "Department" means the department of health services.

3. "Director" means the director of the department of health services.

4. "Environmental laboratory" or "laboratory" means a facility where compliance testing is performed.

5. "Facility" means a place, building, installation, structure or vehicle.

6. "Government agency" means an agency of the United States government, this state or a political subdivision of this state.

7. "Laboratory director" means an individual who administers the technical and scientific operation of an environmental laboratory and who is responsible for reporting laboratory test results as specified in this chapter or rules adopted pursuant to this chapter.

8. "License" means a regular license, renewal license or provisional license issued by the department pursuant to this chapter.

9. "Person" means an individual, employee, officer, managing body, trust, firm, joint stock company, consortium, corporation, partnership, association, state or political subdivision of a state or the United States government.

A.R.S. § 36-495.01 (1995)

§ 36-495.01. Licensure program; rules

A. On or before July 1, 1991, the department shall license environmental laboratories engaged in compliance testing. Upon application for an environmental laboratory

license, the department shall issue the license if, after investigation, the department determines that the application conforms with the standards established by the department.

B. The director shall prescribe rules providing for minimum standards of proficiency, methodology, quality assurance, operation and safety for environmental laboratories and may prescribe standards for personnel education, training and experience to meet federal environmental statutes or regulations, or enabling reciprocity with other states and the manner and form in which compliance testing results are reported. The rules shall be developed in cooperation with the director of the department of environmental quality and shall be consistent with title 49 and rules administered or enforced by the director of environmental quality.

C. The director shall prescribe rules providing minimum standards for third party accreditation.

D. Unless exempted by section 36-495.02, no person may operate or maintain an environmental laboratory without a license issued by the department pursuant to this chapter.

A.R.S. § 36-495.02 (1995)

§ 36-495.02. Exemptions

A. This chapter does not apply to an environmental laboratory in this state that is:

1. Certified or designated by the United States

environmental protection agency as the laboratory which provides analytical services to this state required for the delegation of primary enforcement responsibility under a federal law or regulation administered by that agency.

2. Operated by the Arizona department of agriculture or the radiation regulatory agency.

3. Performing only compliance testing of parameters which require analysis at the time of sample collection as long as the testing methodologies employed are approved by the director of the department of health services or the department of environmental quality.

4. Licensed to perform those analyses for which it is licensed or certified by another agency of this state.

5. Accredited by a national voluntary laboratory accreditation program administered by the national institute of standards and technology and approved by the department.

B. In addition to the exemptions established in subsection A, the director may also exempt by rule certain classes of environmental laboratories and types of compliance testing, parameters and methods, if the director determines that the exemptions will not adversely affect the public health or the environment. The rules shall be developed in cooperation with the director of the department of

environmental quality and the director of the Arizona department of agriculture.

A.R.S. § 36-495.03 (1995)

§ 36-495.03. License application; issuance; expiration

A. Unless exempted pursuant to section 36-495.02, a person who operates or maintains an environmental laboratory located in this state shall file an application with the department at least thirty days before the anticipated operation of a new laboratory for an environmental laboratory license accompanied by the license application fee established by this chapter. A person shall obtain a license for each laboratory, except that only one license is required for contiguous or coterminous laboratories under the same ownership. The director, by rule, shall prescribe when noncontiguous laboratories with the same owners may be operated under a single license.

B. The application shall be on a form prescribed and furnished by the department. The application shall be under oath and shall contain:

1. The name and location of the environmental laboratory.

2. The name of the person owning the facility and the name of the individual directing the laboratory.

3. A description of the services and tests

provided by the environmental laboratory.

4. Other information the department deems necessary to carry out its powers and duties under this chapter.

C. The department shall issue a regular license to an applicant to operate an environmental laboratory to provide the services and tests described in the application if the department determines that the applicant is in compliance with the provisions of this chapter and rules adopted pursuant to this chapter.

D. If the owner is not the laboratory director, the director shall issue a license jointly to the owner and the laboratory director who are jointly responsible for the maintenance and operation of the laboratory and for violations of this chapter or rules adopted pursuant to this chapter.

E. A license issued by the department is valid only in the name of the persons to whom it is issued and cannot be sold, assigned or transferred. A license is valid only for the facility or facilities for which it is issued. If there is a change in the laboratory name, directorship or ownership or an appointment of an acting laboratory director, the license automatically expires, unless within twenty business days after the change the department is notified in writing of the change and an application for a new license is submitted to the department. A fee shall not be charged for this application. The director shall issue a new license reflecting the change if the laboratory is still in compliance with the provisions of this chapter and rules adopted pursuant to this chapter.

F. A regular license expires one year after the date of issuance and shall be renewed on submission of a renewal application and payment of the renewal application fee prescribed in section 36-495.06, at least thirty days before expiration of the license, unless the director determines pursuant to section 36-495.09 that grounds exist to deny the application.

A.R.S. § 36-495.04 (1995)

§ 36-495.04. Laboratory director; duties

The director of an environmental laboratory shall:

1. Ensure that all services and tests provided by the laboratory are performed in compliance with this chapter or rules adopted pursuant to this chapter.

2. Direct and supervise services and tests provided by the laboratory and be responsible for the work of all personnel in the laboratory.

3. Be responsible for safety and hazardous substance control in the laboratory.

A.R.S. § 36-495.05 (1995)

§ 36-495.05. Provisional licenses

A. The department may issue a provisional license for a period of not more than twelve months at the time it issues a notice of suspension of a regular license. The

department may suspend a regular license if an inspection or investigation of a laboratory reveals a violation of the rules adopted by the director pursuant to this chapter and the director believes that the immediate interests of the public are best served by affording the laboratory the opportunity to correct the deficiencies. The director shall issue a provisional license only if the licensee agrees to carry out a plan acceptable to the department to eliminate the deficiencies within the term of the provisional license or period of time specified by the department.

B. A licensee's agreement to carry out a plan of correction does not constitute a waiver of its right to have a hearing on the notice of suspension. A hearing on the notice of suspension may include review of the appropriateness of the laboratory's plan of correction.

C. An application for a regular license may be submitted thirty days before the expiration of a provisional license issued pursuant to this section. The department shall condition its issuance of a regular license at the expiration of the term of the provisional license on the licensee being in full compliance with the correction plan and this chapter or rules adopted pursuant to this chapter.

A.R.S. § 36-495.06 (1995)

§ 36-495.06. Fees

A. The department shall charge and collect a nonrefundable fee for a regular or a renewal license.

B. The director shall establish by rule a fee schedule that does not exceed the cost to the department to conduct an on-site inspection, approve third party accreditation, verify information submitted with the application and other activities related to licensure pursuant to this chapter or rules adopted pursuant to this chapter. The fee schedule for application for a regular or renewal license shall be based on the types of compliance testing that the laboratory is licensed to provide.

A.R.S. § 36-495.07 (1995)

§ 36-495.07. Inspection; investigations

A. The department may make an initial inspection, and thereafter an annual inspection, of each laboratory to determine compliance with this chapter or rules adopted pursuant to this chapter.

B. An application for licensure pursuant to this chapter constitutes permission for the department's entry or inspection of the laboratory during the pendency of the application and, if licensed, during the term of the license for the purpose of determining compliance with this chapter or rules adopted pursuant to this chapter.

C. The department may require, as part of its inspections, that the laboratory demonstrate proficiency in performing tests that it offers by examining specimens submitted by the department, the United States environmental protection agency or other proficiency testing services approved by the department.

D. In addition to the inspections provided for in subsection A of this section, the department, on its own initiative or on the receipt of a written complaint from a person setting forth facts which, if proven, constitute a violation of this chapter or rules adopted pursuant to this chapter, may make an investigation of the laboratory's operations, techniques and procedures. If the investigation or an inspection conducted pursuant to this section discloses past or current noncompliance with statutes and rules, the director, in accordance with section 36-495.09, may deny, suspend or revoke a license issued by the department pursuant to this chapter.

E. At any time the department may conduct an investigation of the operation of an unlicensed laboratory performing compliance testing and may conduct on-site inspections of the laboratory, records, procedures and methods to determine whether the laboratory must be licensed pursuant to this chapter.

F. The director by rule shall establish standards and procedures for third party accreditation and exempting inspections and inspection fees for a laboratory that is accredited by a third party.

A.R.S. § 36-495.08 (1995)

§ 36-495.08. Reports by laboratories

A laboratory shall make available to the department on written request information and data concerning its operation, techniques and procedures. The department may require that

the information be submitted under oath and signed by the owner or director of the laboratory. The department may require the laboratory director or owner to submit other reports or information that it deems necessary to administer this chapter.

A.R.S. § 36-495.09 (1995)

§ 36-495.09. Suspension, revocation or denial of license; hearing

A. Pursuant to title 41, chapter 6 the director may deny, revoke or suspend the license of a laboratory if its owners, officers, agents or employees do any of the following:

1. Violate a provision of this chapter or rules adopted pursuant to this chapter.

2. Issue or cause to be issued a report on environmental laboratory work performed in another laboratory without designating the name and address of the laboratory that performed the test.

3. Commit a felony under the laws of any state or of the United States arising out of or in connection with the operation of a laboratory. The record of conviction or a certified copy is conclusive evidence of conviction.

4. Knowingly aid, permit or abet the submission of false or inaccurate information required by this chapter or rules adopted pursuant to this chapter.

5. Violate the requirements for licensure of the laboratory pursuant to this chapter.

B. If the director reasonably believes that a violation of subsection A, paragraph 5 of this section has occurred and that the life or safety of the public is immediately affected, on written notice to the owner or director of the laboratory, he may order the immediate termination of specific testing services, procedures or practices.

C. Except as provided in subsection B of this section and section 41-1064, subsection C, the director shall not suspend, revoke or deny a license without affording the licensee notice and an opportunity for a hearing as provided in title 41, chapter 6.

D. A person whose application for a license is denied by the director or who has been ordered pursuant to subsection B of this section to immediately terminate specific services, procedures or practices, at any time within thirty days after notice of the denial or order, may request in writing a hearing before the director or a person designated by the director to review the director's action. The hearing shall be held within thirty days after the written request.

E. All hearings shall be held in accordance with

title 41, chapter 6.

A.R.S. § 36-495.10 (1995)

§ 36-495.10. Operation of unlicensed laboratory; cease and desist order; injunction; letter

A. The operation or maintenance of an environmental laboratory that does not hold a current or valid license or that exceeds the range of the services or tests authorized by a license issued pursuant to this chapter is a public nuisance. The director, in addition to other remedies provided in this chapter, may issue a cease and desist order pursuant to section 36-601 or, in the name of the people of this state, through the attorney general, may bring an action for an injunction to restrain the violation or to enjoin the future operation or maintenance of the environmental laboratory until the laboratory complies with the provisions of this chapter.

B. Before issuing a cease and desist order or bringing an action for injunction pursuant to this section, the department may issue a certified letter to a licensed or unlicensed facility in which it states the factual basis for the department's belief that the laboratory is operating in violation of this chapter or rules adopted pursuant to this chapter. The department may include within the letter the enforcement options available to the department if the violations continue.

A.R.S. § 36-495.11 (1995)

§ 36-495.11. Violation; classification

A. A person is guilty of a class 3 misdemeanor if he:

1. Operates, maintains, directs or engages in the business of operating an environmental laboratory without a license issued by the department.

2. Knowingly violates a provision of this chapter or a rule adopted pursuant to this chapter.

B. Each day that a violation continues constitutes a separate offense.

A.R.S. § 36-495.12 (1995)

§ 36-495.12. Violations; civil penalties

A. The department may assess a civil penalty in an amount of not more than three hundred dollars for each violation of this chapter after a hearing is conducted pursuant to title 41, chapter 6. Each day that a violation continues constitutes a separate violation.

B. The attorney general or the county attorney shall bring actions to enforce the collection of penalties assessed pursuant to subsection A in the name of this state in the justice court or the superior court in the county in which

the violation occurs.

C. Penalties assessed under this section are in addition to other penalties imposed pursuant to this chapter.

D. The director shall transmit penalties collected pursuant to this section to the state treasurer for deposit in the state general fund.

A.R.S. § 36-495.13 (1995)

§ 36-495.13. Powers of the director

A. In addition to the rules required by section 36-495.01, the director may adopt other rules and prescribe forms that are necessary for the administration and enforcement of this chapter.

B. The director may issue interpretive guidelines on subjects relating to the rules adopted under this chapter.

C. The director may enter into intergovernmental agreements with other agencies of this state for the purpose of licensing environmental laboratories performing compliance testing.

A.R.S. § 36-495.14 (1995)

§ 36-495.14. Out-of-state laboratories; licensure; reciprocity

A. Except as provided in this section, a laboratory located outside of this state that performs compliance testing

shall be licensed pursuant to this chapter. The laboratory shall pay all applicable fees and is subject to the same investigatory and disciplinary powers of the department. In addition, the department, by rule, may require that the laboratory post a bond with the department to cover the travel costs of prelicensure and postlicensure inspections and evaluations.

B. A laboratory which is located outside of this state and is licensed by this state shall renew the license by submitting an application and fee at least sixty days before the expiration of the license. The department, by rule, may also prescribe that an out-of-state application be accompanied by an additional fee to cover the costs of prerelicensure on-site evaluation and inspection.

C. The director shall designate the location of hearings held in relation to disciplinary matters or the issuance of a license.

D. The director may enter into a reciprocity agreement with the licensing agency of another state if the director determines that the licensing requirements of that state are substantially equal to those of this state. The agreement shall provide that the licensing agencies of both states shall recognize a current license issued by the other state for the purpose of meeting the licensure requirements of either state. The agreement shall also provide that both states, on the request of either state, shall conduct necessary investigations to determine compliance and shall allow on-site inspections by investigators from either state.

E. If a reciprocal state revokes, suspends or refuses to renew the license of a laboratory located in that

state, this state shall recognize that action unless the laboratory notifies the department within five business days of the action that it wishes this state to undertake an independent review and investigation and posts a bond as prescribed by the department to conduct the review. If, at the conclusion of that review, this state determines that the laboratory meets the licensure requirements of this state, it shall issue a license to that laboratory on payment of all fees required by this chapter. Notwithstanding the terms of a reciprocity agreement, if either state takes action contrary to the action of the other, neither state has to recognize the license issued by the other.

A.R.S. § 36-495.15 (1995)

§ 36-495.15. Environmental laboratory licensure revolving fund; use

A. The environmental laboratory licensure revolving fund is established in the department which consists of monies from gifts, grants, donations, fees derived from department sponsored workshops, conferences and seminars and fees collected pursuant to this chapter.

B. Monies in the fund shall be used to support the administration of this chapter and for the costs incurred in administering this chapter and rules adopted for the implementation of this chapter.

C. Monies in the fund are exempt from section 35-190. Interest earned on monies in the fund

shall be credited to the fund.

A.R.S. § 36-495.16 (1995)

§ 36-495.16. Environmental laboratory advisory committee; membership; duties; compensation

A. The environmental laboratory advisory committee is established consisting of members selected by the director. The director shall select members who represent a variety of persons affected by this article. Committee members serve at the pleasure of the director.

B. The committee shall advise the director regarding the adoption of rules and other issues affecting environmental testing laboratories and shall make recommendations regarding interpretive guidelines necessary to properly administer the provisions of this article.

C. Committee members are not eligible to receive compensation but are eligible for reimbursement of expenses pursuant to title 38, chapter 4, article 2.

AMENDED SECTIONS

A.R.S. § 36-495.06 (1999)

§ 36-495.06. Fees

A. The department shall charge and collect a nonrefundable fee for a regular or a renewal license.

B. The director shall establish by rule a fee schedule that does not exceed the cost to the department to conduct an on-site inspection, approve third party accreditation, verify information submitted with the application and other activities related to licensure of environmental laboratories pursuant to this chapter or rules adopted pursuant to this chapter. The fee schedule for application for a regular or renewal license shall be based on the types of compliance testing that the laboratory is licensed to provide.

A.R.S. § 36-495.09 (1997)

§ 36-495.09. Suspension, revocation or denial of license; hearing

A. Pursuant to title 41, chapter 6, the director may deny, revoke or suspend the license of a laboratory if its owners, officers, agents or employees do any of the following:

1. Violate a provision of this chapter or rules adopted pursuant to this chapter.

2. Issue or cause to be issued a report on environmental laboratory work performed in another laboratory without designating the name and address of the laboratory that performed the work.

3. Commit a felony under the laws of any

state or of the United States arising out of or in connection with the operation of a laboratory. The record of conviction or a certified copy is conclusive evidence of conviction.

4. Knowingly aid, permit or abet the submission of false or inaccurate information required by this chapter or rules adopted pursuant to this chapter.
5. Violate the requirements for licensure of the laboratory pursuant to this chapter.

B. If the director reasonably believes that a violation of subsection A, paragraph 5 of this section has occurred and that the life or safety of the public is immediately affected, on written notice to the owner or director of the laboratory, he may order the immediate termination of specific testing services, procedures or practices.

C. Except as provided in subsection B of this section and section 41-1064, subsection C, the director shall not suspend, revoke or deny a license without affording the licensee notice and an opportunity for a hearing as provided in title 41, chapter 6, article 10.

D. A person whose application for a license is denied by the director or who has been ordered pursuant to subsection B of this section to immediately terminate specific services, procedures or practices, at any time within thirty days after notice of the denial or order, may request in

writing a hearing before the director or a person designated by the director to review the director's action. The hearing shall be held within thirty days after the written request.

E. All hearings shall be held in accordance with title 41, chapter 6, article 10.

A.R.S. § 36-495.12 (1997)

§ 36-495.12. Violations; civil penalties

A. The department may assess a civil penalty in an amount of not more than three hundred dollars for each violation of this chapter after a hearing is conducted pursuant to title 41, chapter 6, article 10. Each day that a violation continues constitutes a separate violation.

B. The attorney general or the county attorney shall bring actions to enforce the collection of penalties assessed pursuant to subsection A in the name of this state in the justice court or the superior court in the county in which the violation occurs.

C. Penalties assessed under this section are in addition to other penalties imposed pursuant to this chapter.

D. The director shall transmit penalties collected pursuant to this section to the state treasurer for deposit in the state general fund.

A.R.S. § 36-495.15 (1999)

§ 36-495.15. Environmental laboratory licensure revolving fund; use

A. The environmental laboratory licensure revolving fund is established in the department which consists of monies from gifts, grants, donations, fees derived from department sponsored workshops, conferences and seminars and fees collected pursuant to this chapter.

B. Subject to legislative appropriation, monies in the fund shall be used to support the administration of this chapter and for the costs incurred in administering this chapter and rules adopted for the implementation of this chapter.

C. Monies in the fund are exempt from section 35-190. Interest earned on monies in the fund shall be credited to the fund.

TITLE 41. STATE GOVERNMENT
CHAPTER 6. ADMINISTRATIVE PROCEDURE
ARTICLE 6. ADJUDICATIVE PROCEEDINGS
A.R.S. § 41-1061 (1994)

§ 41-1061. Contested cases; notice; hearing; records

A. In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice. Unless otherwise provided by law, the notice shall be given at least twenty days prior to the date set for the hearing.

B. The notice shall include:

1. A statement of the time, place and nature of the hearing.

2. A statement of the legal authority and jurisdiction under which the hearing is to be held.

3. A reference to the particular sections of the statutes and rules involved.

4. A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application a more definite and detailed statement shall be furnished.

C. Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

D. Unless precluded by law, and except as to claims for compensation and benefits under chapter 6 of title 23, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default.

E The record in a contested case shall include:

1. All pleadings, motions, interlocutory rulings.

2. Evidence received or considered.

3. A statement of matters officially noticed.

4. Objections and offers of proof and rulings thereon.

5. Proposed findings and exceptions.

6. Any decision, opinion or report by the officer presiding at the hearing.

7. All staff memoranda, other than privileged communications, or data submitted to the hearing officer or members of the agency in connection with their consideration of the case.

F. Oral proceedings or any part thereof shall be recorded manually or by a recording device and shall be transcribed on request of any party, unless otherwise provided by law. The cost of such transcript shall be paid by the party making the request, unless otherwise provided by law or unless assessment of the cost is waived by the agency.

G. Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

A.R.S. § 41-1062 (1994)

§ 41-1062. Hearings; evidence; official notice; power to require testimony and records; rehearing

A. Unless otherwise provided by law, in contested cases the following shall apply:

1. A hearing may be conducted in an informal manner and without adherence to the rules of evidence required in judicial proceedings. Neither the manner of conducting the hearing nor the failure to adhere to the rules of evidence required in judicial proceedings shall be grounds for reversing any administrative decision or order providing the evidence supporting such decision or order is substantial, reliable, and probative. Irrelevant, immaterial or unduly repetitious evidence shall be excluded. Every person who is a party to such proceedings shall have the right to be represented by counsel, to submit evidence in open hearing and shall have the right of cross-examination. Unless otherwise provided by law, hearings may be held at any place determined by the agency.

2. Copies of documentary evidence may be received in the discretion of the

presiding officer. Upon request, parties shall be given an opportunity to compare the copy with the original.

3. Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of the material noticed including any staff memoranda or data and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence.

4. The officer presiding at the hearing may cause to be issued subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence and shall have the power to administer oaths. Unless otherwise provided by law or agency rule, subpoenas so issued shall be served and, upon application to the court by a party or the agency, enforced in the manner provided by law for the service and enforcement of subpoenas in a civil

action. On application of a party or the agency and for use as evidence, the officer presiding at the hearing may permit a deposition to be taken, in the manner and upon the terms designated by him, of a witness who cannot be subpoenaed or is unable to attend the hearing. Prehearing depositions and subpoenas for the production of documents may be ordered by the officer presiding at the hearing, provided that the party seeking such discovery demonstrates that the party has reasonable need of the deposition testimony or materials being sought. All provisions of law compelling a person under subpoena to testify are applicable. Fees for attendance as a witness shall be the same as for a witness in the superior courts of the state of Arizona, unless otherwise provided by law or agency rule. Notwithstanding the provisions of section 12-2212, no subpoenas, depositions or other discovery shall be permitted in contested cases except as provided by agency rule or this paragraph.

B. Except when good cause exists otherwise, the agency shall provide an opportunity for a rehearing or review of the decision of an agency before such decision becomes final. Such rehearing or review shall be governed by agency

rule drawn as closely as practicable from rule 59, Arizona rules of civil procedure, relating to new trial in superior court.

A.R.S. § 41-1063 (1994)

§ 41-1063. Decisions and orders

Unless otherwise provided by law, any final decision or order adverse to a party in a contested case shall be in writing or stated in the record. Any final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. Unless otherwise provided by law, parties shall be notified either personally or by mail to their last known address of any decision or order. Upon request a copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record.

A.R.S. § 41-1064 (1994)

§ 41-1064. Licenses; renewal; revocation; suspension; annulment; withdrawal

A. When the grant, denial or renewal of a license is required to be preceded by notice and an opportunity for a hearing, the provisions of this article concerning contested cases apply.

B. When a licensee has made timely and sufficient application for the renewal of a license or a new license with

reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

C. No revocation, suspension, annulment or withdrawal of any license is lawful unless, prior to the action, the agency provides the licensee with notice and an opportunity for a hearing in accordance with this chapter. If the agency finds that the public health, safety or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

A.R.S. § 41-1065 (1994)

§ 41-1065. Hearing on denial of license or permit

Proceedings for licenses or permits on application when not required by law to be preceded by notice and opportunity for hearing shall be governed by the provisions of the law relating to the particular agency, provided that when an application for a license or permit is denied under the provisions of the law relating to a particular agency the applicant shall be entitled to have a hearing before such agency on such denial upon filing within fifteen days after receipt of notice of such refusal a written application for such hearing. Notice shall be given in the manner prescribed by § 41-1061. At such hearing such applicant shall be the moving

party and have the burden of proof. Such hearing shall be conducted in accordance with this chapter for hearing of a contested case before an agency. Such hearing before such agency shall be limited to those matters originally presented to the agency for its determination on such application.

A.R.S. § 41-1066 (1994)

§ 41-1066. Compulsory testimony; privilege against self-incrimination

A. A person may not refuse to attend and testify or produce evidence sought by an agency in an action, proceeding or investigation instituted by or before the agency on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture unless it constitutes the compelled testimony or the private papers of the person which would be privileged evidence either pursuant to the fifth amendment of the Constitution of the United States or article II, § 10, Constitution of Arizona, and the person claims the privilege prior to the production of the testimony or papers.

B. If a person asserts his privilege against self-incrimination and the agency seeks to compel production of the testimony or documents sought, it may, with the prior written approval of the attorney general, issue a written order compelling the testimony or production of documents in proceedings and investigations before the agency or apply to the appropriate court for such an order in other actions or proceedings.

C. Evidence produced pursuant to subsection B is

not admissible in evidence or usable in any manner in a criminal prosecution, except for perjury, false swearing, tampering with physical evidence or any other offense committed in connection with the appearance made pursuant to this section against the person testifying or the person producing his private papers.

TITLE 41. STATE GOVERNMENT
CHAPTER 6. ADMINISTRATIVE PROCEDURE
ARTICLE 10. OFFICE OF ADMINISTRATIVE HEARINGS
A.R.S. § 41-1092 (1995)

§ 41-1092. Definitions
Effective October 1, 1995

In this article, unless the context otherwise requires:

1. "Director" means the director of the office of administrative hearings.

2. "Office" means the office of administrative hearings.

A.R.S. § 41-1092.01 (1995)

§ 41-1092.01. Office of administrative hearings; director; powers and duties
Effective October 1, 1995

A. An office of administrative hearings is established.

B. The governor shall appoint the director pursuant to section 38-211. At a minimum, the director shall have the experience necessary for appointment as an administrative law judge prescribed by subsection G of this section. The director also shall possess supervisory, management and administrative skills, as well as knowledge and experience relating to administrative law.

C. The director shall:

1. Serve as the chief administrative law judge of the office.
2. Make and execute the contracts and other instruments that are necessary to perform the director's duties.
3. Hire employees, including full-time administrative law judges, and contract for special services, including temporary administrative law judges, that are necessary to carry out article 6 of this chapter and this article.
4. Adopt rules that are necessary to carry out article 6 of this chapter and this article, including rules governing ex parte communications in contested cases.
5. Submit a report to the governor, speaker of the house of representatives and president of the senate by November 1 of each year describing

the activities and accomplishments of the office. The director's annual report shall include a summary of the extent and effect of agencies' utilization of administrative law judges, court reporters and other personnel in proceedings under this article and recommendations for changes or improvements in the administrative procedure act or any agency's practice or policy with respect to the administrative procedure act.

6. Secure, compile and maintain all decisions, opinions or reports of administrative law judges issued pursuant to this article and the reference materials and supporting information that may be appropriate.

7. Develop, implement and maintain a program for the continuing training and education of administrative law judges and agencies in regard to their responsibilities under this article.

8. Develop, implement and maintain a program of evaluation to aid the director in the evaluation of administrative law judges appointed pursuant to this article that includes comments received from the public.

D. The director shall not require legal representation to appear before an administrative law judge.

E. All state agencies, unless exempted by this article, shall use the services and personnel of the office to conduct administrative hearings. All agencies supported by other than general fund sources shall contract for administrative hearing services from the office.

F. Each state agency, and each political subdivision contracting for office services pursuant to subsection I of this section, shall make its facilities available, as necessary, for use by the office in conducting proceedings pursuant to this article.

G. The office shall employ full-time administrative law judges to conduct hearings required by this article or other laws as follows:

1. The director shall assign administrative law judges from the office to an agency, on either a temporary or a permanent basis, at supervisory or other levels, to preside over contested cases in accordance with the special expertise of the administrative law judge in the subject matter of the agency.

2. The director shall establish the subject matter and agency sections within the office that are necessary to carry out this article.

H. If the office cannot furnish an office administrative law judge promptly in response to an agency request, the director may contract with qualified individuals to serve as temporary administrative law judges. These temporary administrative law judges are not employees of this state.

I. The office may provide administrative law judges on a contract basis to any governmental entity to conduct any hearing not covered by this article. The director may enter into contracts with political subdivisions of this state, and these political subdivisions may contract with the director for the purpose of providing administrative law judges and reporters for administrative proceedings or informal dispute resolution. The contract may define the scope of the administrative law judge's duties, which may include the preparation of findings, conclusions, decisions or recommended decisions or a recommendation for action by the political subdivision. For these services, the director shall request payment for services directly from the political subdivision for which the services are performed, and the director may accept payment on either an advance or reimbursable basis.

A.R.S. § 41-1092.02 (1995)

§ 41-1092.02. Contested cases; application of procedural rules; exemption from article
Effective October 1, 1995

A. This article applies to all contested cases as defined in section 41-1001, except contested cases with:

1. The state department of corrections.

2. The board of executive clemency.

3. The industrial commission of Arizona.

4. The Arizona corporation commission.

5. The Arizona board of regents and institutions under its jurisdiction.

6. The state personnel board.

7. The department of youth treatment and rehabilitation.

8. The department of transportation.

9. The Arizona health care cost containment system.

10. The department of economic security.

11. The department of revenue regarding income tax, withholding tax or estate tax or any tax issue related to information associated with the reporting of income tax, withholding tax or estate tax.

12. The board of tax appeals.

13. The state board of equalization.

B. Unless waived by all parties, an administrative law judge assigned by the office shall conduct all hearings under this article, and the procedural rules set forth in article 6 of this chapter and rules adopted by the director apply.

C. Except as provided in subsection A of this section, a contested case heard by the office of administrative hearings regarding taxes administered under title 42 shall be subject to the provisions under section 42-122.

D. Except as provided in subsection A of this section, a final decision of the office of administrative hearings regarding taxes administered under title 42 may be appealed by either party to the director of the department of revenue, or a taxpayer may file and appeal directly to the board of tax appeals pursuant to section 42-124.

A.R.S. § 41-1092.03 (1996)

§ 41-1092.03. Notice of appealable agency action; hearing; informal settlement conference; applicability
Applies to notices of appeal filed with an agency after October 1, 1996

A. An agency shall serve notice of an appealable agency action pursuant to section 41-1092.04. The notice shall include a description of the party's right to request a hearing on an appealable agency action and to request an informal settlement conference pursuant to section 41-1092.06.

B. A party may obtain a hearing on an appealable

agency action by filing a notice of appeal with the agency within thirty days after receiving the notice prescribed in subsection A of this section. The notice may be filed by a party whose legal rights, duties or privileges were determined by the appealable agency action. A notice of appeal also may be filed by a party who will be adversely affected by the appealable agency action and who exercised any right to comment on the action provided by law or rule, provided that the grounds for appeal are limited to issues raised in that party's comments. The notice of appeal shall identify the party, the party's address, the agency and the action being appealed and shall contain a concise statement of the reasons for the appeal. The agency shall notify the office of the appeal and the office shall schedule a hearing pursuant to section 41-1092.05, except as provided in section 41-1092.01, subsection F.

C. If good cause is shown an agency head may accept an appeal that is not filed in a timely manner.

A.R.S. § 41-1092.04 (1996)

§ 41-1092.04. Service of documents
Applies to notices of appeal filed with an agency after October 1, 1996

Unless otherwise provided in this article, every notice or decision under this article shall be served by personal delivery or certified mail, return receipt requested, or by any other method reasonably calculated to effect actual notice on the agency and every other party to the action to the party's last address of record with the agency. Each party shall inform the agency and the office of any change of address within five days of the change.

A.R.S. § 41-1092.05 (1996)

§ 41-1092.05. Scheduling of hearings
Applies to notices of appeal filed with an agency after October 1, 1996

A. Hearings for appealable agency actions shall be held within sixty days after the notice of appeal is filed. Hearings for contested cases shall be held within sixty days after the agency's request for a hearing unless good cause is shown for holding the hearing beyond that period. The date scheduled for the hearing may be advanced or delayed on the agreement of the parties or on a showing of good cause.

B. The agency shall prepare and serve a notice of hearing on all parties to the appeal at least thirty days before the hearing. The notice shall be as provided in section 41-1061, subsection B.

A.R.S. § 41-1092.06 (1996)

§ 41-1092.06. Appeals of agency actions; informal settlement conferences; applicability
Applies to notices of appeal filed with an agency after October 1, 1996

A. If requested by the appellant of an appealable agency action, the agency shall hold an informal settlement conference within fifteen days after receiving the request. A request for an informal settlement conference shall be in writing and shall be filed with the agency no later than twenty days before the hearing. If an informal settlement conference is requested, the agency shall notify the office of the request

and the outcome of the conference, except as provided in section 41-1092.01, subsection F. The request for an informal settlement conference does not toll the sixty day period in which the administrative hearing is to be held pursuant to 41-1092.05.

B. If an informal settlement conference is held, a person with the authority to act on behalf of the agency must represent the agency at the conference. The parties participating in the settlement conference shall waive their right to object to the participation of the agency representative in the final administrative decision.

A.R.S. § 41-1092.07 (1996)

§ 41-1092.07. Hearing procedures
Applies to notices of appeal filed with an agency after October 1, 1996

A. The parties to a contested case or appealable agency action have the right to be represented by counsel or to proceed without counsel, to submit evidence and to cross-examine witnesses.

B. The administrative law judge may issue subpoenas to compel the attendance of witnesses and the production of documents. the subpoenas shall be served and, on application to the superior court, enforced in the manner provided by law for the service and enforcement of subpoenas in civil matters. The administrative law judge may administer oaths and affirmations to witnesses.

C. All relevant evidence is admissible, but the

administrative law judge may exclude evidence if its probative value is outweighed by the danger of unfair prejudice, by confusion of the issues or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. The administrative law judge shall exercise reasonable control over the manner and order of cross-examining witnesses and presenting evidence to make the cross-examination and presentation effective for ascertaining the truth, avoiding needless consumption of time and protecting witnesses from harassment or undue embarrassment.

D. All hearings shall be recorded. The administrative law judge shall secure either a court reporter or an electronic means of producing a clear and accurate record of the proceeding at the agency's expense. Any party that requests a transcript of the proceeding shall pay the costs of the transcript to the court reporter or other transcriber.

A.R.S. § 41-1092.08 (1996)

§ 41-1092.08. Final administrative decisions; review
Applies to notices of appeal filed with an agency after October 1, 1996

A. The administrative law judge shall issue a written decision within fifteen days after the hearing is concluded. The written decision shall contain a concise explanation of the reasons supporting the decision. The administrative law judge shall serve a copy of the decision on the agency. upon request of the agency, the office shall also transmit to the agency the record of the hearing as prescribed in section 41-1092.10, except as provided in section 41-1092.01, subsection F.

B. Within thirty days after receiving a copy of the administrative law judge's decision, the head of the agency may review the decision and accept, reject or modify it. If the head of the agency declines to review the administrative law judge's decision, the agency shall serve a copy of the decision on all parties. If the head of the agency rejects or modifies the decision the agency head must file with the office, except as provided in section 41-1092.01, subsection F, and serve on all parties a copy of the administrative law judge's decision with the rejection or modification and a written justification setting forth the reasons for the rejection or modification.

C. A board or commission whose members are appointed by the governor may review the decision of the agency head, as provided by law, and make the final administrative decision.

D. The decision of the agency head is the final administrative decision unless either:

1. The agency head does not review the administrative law judge decision pursuant to subsection B of this section, in which case the administrative law judge decision is the final administrative decision.

2. The decision of the agency head is subject to review pursuant to subsection C of this section.

E. If a board or commission whose members are appointed by the governor makes the final administrative

decision as an administrative law judge or upon review of the decision of the agency head, the decision is not subject to review by the head of the agency.

F. If a party has not requested a hearing upon receipt of a notice of appealable agency action pursuant to section 41-1092.03, the appealable agency action is not subject to judicial review pursuant to sections 41-1092.10 and 41-1092.11.

A.R.S. § 41-1092.09 (1996)

§ 41-1092.09. Opportunity for rehearing or review Applies to notices of appeal filed with an agency after October 1, 1996

A party may file a motion for rehearing or review within thirty days after receiving the final administrative decision. The agency head, board or commission shall rule on the motion within fifteen days after the motion has been received. After a hearing has been held and a final administrative decision has been entered pursuant to section 41-1092.08, a party is not required to file a motion for rehearing or review of the decision in order to exhaust the party's administrative remedies.

A.R.S. § 41-1092.10 (1996)

§ 41-1092.10. Judicial review of agency actions; filing of action; transmission of record; applicability
Applies to notices of appeal filed with an agency after October 1, 1996

A. A party to a contested case or an appeal of an agency action conducted pursuant to this article may obtain judicial review of the final administrative decision by filing a complaint in superior court within thirty-five days after receiving a copy of the final administrative decision. If the party seeks a rehearing or review of the final administrative decision, pursuant to section 41-1092.09, the thirty-five days shall run from receipt of the decision on rehearing or review.

B. Within ten days after filing the complaint in superior court the party seeking judicial review shall file a notice of the action with the office or the agency that conducted the hearing as provided in section 41-1092.01, subsection F.

C. The record transmitted to the superior court shall consist of the following:

1. The original agency action from which review is sought.

2. Any motions, memoranda or other documents submitted by the parties to the appeal.

3. Any exhibits admitted as evidence at

the administrative hearing.

4. The decision by the administrative law judge and any revisions or modifications to the decision.

5. A copy of the transcript of the administrative hearing, if the party seeking judicial review desires a transcript to be included in the record and provides for preparation of the transcript at the party's own expense. Any other party may have a transcript included in the record by filing a notice with the office or the agency that conducted the hearing within ten days after receiving notice of the complaint and providing for preparation of the transcript at the party's own expense.

A.R.S. § 41-1092.11 (1996)

§ 41-1092.11. Judicial review of agency actions Applies to notices of appeal filed with an agency after October 1, 1996

A. If a party fails to seek review of a final administrative decision within the time provided in this article, the decision is not subject to judicial review under this article except for the purpose of questioning the jurisdiction of the agency over the person or subject matter.

B. Unless otherwise prescribed in the statute under

authority of which the final administrative decision was made, an action to review a final administrative decision may be commenced in the superior court of any county in which any of the following conditions apply:

1. Any part of the hearing or proceeding culminating in the decision of the agency was held.

2. Any part of the subject matter involved is situated.

3. Any part of the transaction giving rise to the administrative proceedings occurred.

C. The superior court, with or without bond, and before or after answer, may stay the decision in whole or in part pending final disposition of the case, after notice to the agency and for good cause shown.

D. Technical errors in the administrative proceedings or failure to observe technical rules of evidence shall not constitute grounds for reversal of the decision, unless it appears to the court that the error or failure affected the rights of a party and resulted in injustice to the party.

E. On motion of a party before rendition of judgment, the court shall make findings of fact and state conclusions of law on which its judgment is based.

F. If applicable, the rules of civil procedure in superior courts, including rules relating to appeals to the

supreme court, shall apply to all proceedings except as otherwise provided in this article.

G. Service of process, scope of judicial review and costs awarded to the defendant agency shall be as provided in sections 12-906, 12-910 and 12-912.

A.R.S. § 41-1092.12 (1999)

§ 41-1092.12. Private right of action; recovery of costs and fees; definitions

A. If an agency takes an action against a party that is arbitrary, capricious or not in accordance with law, the action is an appealable agency action if all of the following apply:

1. Within ten days after the action that is arbitrary, capricious or not in accordance with law, the party notifies the director of the agency in writing of the party's intent to file a claim pursuant to this section. This notice shall include a description of the action the party claims to be arbitrary, capricious or not in accordance with law and reasons why the action is arbitrary, capricious or not in accordance with law.

2. The agency continues the action that is arbitrary, capricious or not in accordance with law more than ten

days after the agency receives the notice.

3. The action is not excluded from the definition of appealable agency action as defined in section 41-1092.

B. This section only applies if an administrative remedy or an administrative or a judicial appeal of final agency action is not otherwise provided by law.

C. If the party prevails, the agency shall pay reasonable costs and fees to the party from any monies appropriated to the agency and available for that purpose or from other operating monies of the agency. If the agency fails or refuses to pay the award within fifteen days after the demand, and if no further review or appeal of the award is pending, the prevailing party may file a claim with the department of administration. The department of administration shall pay the claim within thirty days in the same manner as an uninsured property loss under title 41, chapter 3.1, article 1, except that the agency is responsible for the total amount awarded and shall pay it from its operating monies. If the agency had appropriated monies available for paying the award at the time it failed or refused to pay, the legislature shall reduce the agency's operating appropriation for the following fiscal year by the amount of the award and shall appropriate that amount to the department of administration as reimbursement for the loss.

D. If the administrative law judge determines that the appealable agency action is frivolous, the administrative law judge may require the party to pay reasonable costs and

fees to the agency in responding to the appeal filed before the office of administrative hearings.

E. For the purposes of this section:

1. "Action against the party" means any of the following that results in the expenditure of costs and fees:

   (a) A decision.
   (b) An inspection.
   (c) An investigation.
   (d)The entry of private property.

2. "Agency" means the department of environmental quality established pursuant to title 49, chapter 1, article 1.

3. "Costs and fees" means reasonable attorney and professional fees.

4. "Party" means an individual, partnership, corporation, association and public or private organization at whom the action was directed and who has expended costs and fees as a result of the action against the party.

ARIZONA ADMINISTRATIVE CODE

TITLE 9. HEALTH SERVICES

CHAPTER 14. DEPARTMENT OF HEALTH SERVICES: LABORATORIES

ARTICLE 6. LICENSING OF ENVIRONMENTAL LABORATORIES

R9-14-601. Definitions

Words and phrases are defined in A.R.S. §§ 36-495 have the same meaning when used in these rules. In this Article, unless otherwise specified:

1. "ADEQ" means the Arizona Department of Environmental Quality.

2. "Approved method" means an analytical test method which is recognized by the Department as acceptable to test for the presence of the particular contaminant.

3. "Arizona Permit System for Aquifer Protection" means the permit system specified in A.R.S. §§ 49-141 through 49-251.

4. "Arizona Permit System for Reuse of Wastewater" means the permit system specified in A.R.S. §§ 49-104 sand 49-250.

5. "Blind proficiency evaluation audit" means

that the Department submits a series of proficiency evaluation samples to a laboratory in such a manner that the laboratory is unaware that it is testing a proficiency evaluation sample.

6. "Categories" of laboratory testing means drinking water, wastewater, hazardous waste, or air.

7. "Clean Air Act" means 42 U.S.C.A. 7401-7642.

8. "Clean Water Act" means 33 U.S.C.A. 1251-1376.

9. "Comprehensive Environmental Response, Compensation and Liability Act" means 42 U.S.C.A. 9601-9657, commonly referred to as the Superfund Act.

10. "Contiguous grounds" means real property which can be enclosed by a single unbroken boundary line which does not enclose property owned or leased by others.

11. "Effluent" mean an outflow, as a stream which flows out of a facility.

12. "Environmental water laboratory" means a laboratory that holds a valid license issued by the Department prior to the effective date of this Article.

13. "EPA" means the United States Environmental Protection Agency.

14. "Federal Insecticide Fungicide and Rodenticide Act" means 7 U.S.C.A. 136-136y.

15. "Intercomparison studies" means the proficiency evaluation service for radiochemical samples established by EPA's Environmental Monitoring Systems Laboratory.

16. "Licensure" means the approval by the Department of a laboratory to perform compliance testing for environmental monitoring programs, categories of laboratory testing, parameters of laboratory testing and approved methods of laboratory testing as defined in A.R.S. § 36-495.03 through A.R.S. §36-495.16 and this Article.

17. "Parameter" means 1 of a set of chemical, physical, radiochemical, microbiological, or biological properties whose value determines the characteristics of an environmental sample.

18. "Proficiency evaluation audit" means an audit conducted by a service on a series of samples submitted to a laboratory for use in evaluation the laboratory's ability to correctly analyze compliance testing samples.

19. "Proficiency evaluation service" means the Department, EPA, or an independent service acceptable to the Department which provides proficiency evaluation audit samples and evaluates the results of the proficiency evaluation audit.

20. "Principal State Laboratory System" means the system which includes the Department, Division of State Laboratory Services, and the Radiation Regulatory Agency Laboratory, which are certified by EPA.

21. "Radiation assessment proficiency evaluation audit" means any proficiency evaluation audit required by EPA under the Safe Drinking Water for radiochemistry testing.

22. "Resource Conservation and Recovery Act" means 42 U.S.C.A. 6921-6939B.

23. "Safe Drinking Water Act" means 42 U.S.C.A. 300f-300j-11.

24. "Single Method" means the approved method licensure fee for any single method listed in that subsection.

25. "U.S.C.A." means *United States Code Annotated*.

26. "Water pollution proficiency evaluation audit" means any proficiency evaluation audit

established by the EPA under the Clean Water Act.

27. "Water supply study audit" means any proficiency evaluation audit required by the EPA under the Safe Drinking Water Act.

R9-14-602. License Applicability

A. This Article shall not apply to compliance testing of parameters outlined in A.R.S. §§ 36-495.02.A.3.

B. This Article shall not apply to laboratory compliance testing which is performed pursuant tot he Federal Insecticide Fungicide and Rodenticide Act.

R9-14-603. Initial Licensure Process

A. To obtain a license the laboratory shall file a complete application on a form provided by the Department pursuant to A.R.S. § 36-495.03 (A) and (B), and submit payment of all applicable fees to the Department pursuant to R9-14-606.

B. Multiple laboratories located on contiguous grounds and under the same ownership may be licensed under a single license.

C. Multiple Laboratories, including mobile laboratories located on non-contiguous grounds and under the same ownership may be licensed independently or under a single license at the owner's discretion. If the laboratory chooses the single license option, each nonmobile laboratory shall be located within Arizona

and each mobile laboratory shall maintain Arizona vehicle registration.

D. An application for licensure shall be made for any of the approved methods contained in R9-14-608 and R9-14-609 through R9-14-612 for compliance testing required by ADEQ; the Clean Air Act; the Clean Water Act; the Comprehensive Environmental Response, Compensation and Liability Act; the Resource Conservation and Recovery Act; the Safe Drinking Water Act; or the Toxic Substance Control Act.

E. The Department shall determine if the application is complete and mail notification to the applicant with a detailed list of deficiencies if incomplete within 3 weeks from receipt of the application and fees. An application is not complete without payment of all applicable fees. Upon receipt of a complete application, the Department shall schedule a laboratory inspection, proficiency evaluation audit, or both, no longer than 1 month later for an in-state lab and 2 months later for an out-of-state lab. The Department and applicant may mutually agree to extend the inspection date.

F. The Department may grant a temporary license for all sample matrices except drinking water, out-of-state laboratory, before an on-site inspection occurs, provided:

1. The laboratory has submitted a complete application,

2. The laboratory has provided successful proficiency evaluation results from current EPA studies or 3rd party proficiency evaluation audits, and
3. The laboratory has provided current certification information for comparable testing from another state certification program.

G. The Department shall provide the laboratory director with a written report of findings of compliance with A.R.S. Title 36, Chapter 4.3, Article I and this Article, within 6 weeks from the completion of any inspection, investigation, or proficiency evaluation audit.

H. If the laboratory is not in compliance:

1. Within 3 weeks from receipt of a report of noncompliance, the laboratory shall submit a written corrective action plan acceptable to the Department with corrective action and completion dates no longer than 4 months from the date the laboratory receives the written report of noncompliance.
2. Within 6 weeks of receipt of the laboratory's plan of corrective action, the Department shall provide the laboratory with a written approval or disapproval.
3. If the laboratory's plan of corrective action is disapproved by the Department, the laboratory

shall submit a new corrective action plan for the items which the Department has disapproved within 3 weeks from receipt of the Department's written disapproval.

4. Within 3 weeks of receipt of the laboratory's revised corrective action plan, the Department shall provide the laboratory with a written approval or disapproval of the revised plan.

I. The Department will send written notification of approval or denial of an application within 9 months for an in-state lab and 10 months for an out-of-state lab. Denials shall set forth the reasons for denial and all other information required under A.R.S. § 41-1076.

J. This Section shall apply to a laboratory not currently licensed in Arizona until either of the following occurs:

1. The laboratory owner or operator is issued a laboratory license pursuant to this Article, or
2. The laboratory owner or operator is notified of the Department's intent to deny a laboratory license.

K. Notification by the Department of issuance or denial of a license shall not exceed 9 months for in-state labs, and 10 months for out-of-state labs from the date that the Department determined that the application was complete. Completeness review is 3 weeks. The overall time frame is 9 months and 3 weeks for in-

state labs and 10 months and 3 weeks for out-of-state labs.

L. For purpose of computing time frames in this Section intermediate Saturdays, Sundays, and legal holidays shall be included in the computation. The last day of the time period will be included unless it is a Saturday, Sunday, or legal holiday.

R9-14-604. Licensure Renewal Process

A. At least 1 month prior to the expiration of its current license, a laboratory must submit to the Department, a complete application and payment of all applicable fees prescribed in R9-14-606.

B. The Department shall notify the laboratory director of any deficiency in the application and payment of fees within 3 weeks from the receipt of the application and fees. If application is complete and proper fees are submitted, the Department shall renew a laboratory license, unless the Director determines pursuant to A.R.S. § 36-495.09 that grounds exist to deny the license.

C. The Department may grant a temporary license to a laboratory with an existing laboratory license, if the laboratory is moving to a new location. The Department shall not grant the temporary license to such laboratories if the owner or director is also changed.

D. The Department may conduct a laboratory inspection

or proficiency evaluation audit, or both, at any time during the licensure period.

E. The Department shall provide the laboratory director with a written report of findings within 6 weeks from the completion of any inspection, investigation, or proficiency evaluation audit.

F. A licensed laboratory that cannot demonstrate compliance with this Article, shall submit to the Department within 6 weeks from the date the laboratory receives the written report of findings, a written plan to correct deficiencies listed in the written report of findings with corrective action and completion dates acceptable to the Department.

G. The Department shall provide the laboratory with a written response within 6 weeks of receipt of the laboratory's plan of corrective action to the Department's written report of findings.

R9-14-605. Provisional Licensure

A. The Department may issue a provisional license when its investigation, inspection, or proficiency evaluation audit identifies deficiencies, but the number and nature of deficiencies do not pose a risk to public health, safety, or the environment.

B. The Department may issue a provisional license for any of the following reasons:

1. The laboratory does not adhere to the

applicable references in R9-14-608 or the requirements for facilities, equipment, reagents, quality control practices, or approved methods appropriate to the sample matrix as listed in R9-14-609 through R9-14-612;

2. the laboratory fails to participate in a proficiency evaluation audit and submit results within the acceptance limits or the time frames established by the proficiency evaluation service;
3. Two consecutive proficiency evaluation audit reports have the same parameter deemed outside acceptance limits by a proficiency evaluation service; or
4. The laboratory fails to submit a written corrective action report to the Department within 6 weeks of the receipt of proficiency evaluation audit results that are deemed outside acceptable limits.

C. The Department shall issue an amended certified list of parameters for the provisional license.

D. The licensee shall return its license to the Department within 10 working days from the date of receipt of written notification that the Department issued a provisional license.

E. A provisional license shall be valid for a set period established by the Department, not to exceed the expiration date of the laboratory's suspended license.

F. A laboratory with a provisional license may renew its license provided that it applies for renewal at least 6 weeks prior to the expiration of its provisional license. At such time, the Department shall issue to the laboratory a renewed license, unless the Director determines pursuant to A.R.S. § 36-495.09 that grounds exist to revoke the license.

R9-14-607. Proficiency Evaluation

A. Each laboratory shall demonstrate proficiency as determined by the Department through proficiency evaluation audits provided by the Principal State Laboratory System, if available, or a proficiency evaluation service provider approved by the Department. The laboratory shall analyze and report proficiency evaluation audit sampled for the testing program, category of testing, parameter, and approved methods for which an initial license or renewal license has been requested. Proficiency evaluation parameters reported by the laboratory for subsections (B) through (G) of this Section shall be within acceptance limits established by the proficiency evaluation service or in addition for subsection (B) as required by 40 CFR §§ 141.24-f.17.

B. To maintain licensure for the approved methods listed for chemistry in R9-14-609, the laboratory shall demonstrate continued proficiency through audits provided by the EPA's water supply study (WS) audit program, the Principal State Laboratory System proficiency evaluation audit program, if available or a proficiency evaluation service accepted by the

Department.

C. To maintain licensure for the approved methods listed for chemistry in R9-14-610 and R9-14-611, the laboratory shall demonstrate continued proficiency through audits provided by the EPA's water pollution (WP) proficiency evaluation audit program, the Principal State Laboratory System proficiency evaluation audit program, if available, or a proficiency evaluation service accepted by the Department.

D. To maintain a licensure for the approved methods listed for microbiology in R9-14-609 through R9-14-611, the laboratory shall demonstrate continued proficiency through audits provided by the EPA's proficiency evaluation audit program, if available, or a proficiency evaluation service accepted by the Department.

E. To maintain licensure for the approved methods listed for radiochemicals in r9-14-609 through R9-14-611, the laboratory shall demonstrate continued proficiency through audits provided by the EPA's radiation assessment proficiency evaluation audit and the Intercomparison studies audit programs.

F. To maintain licensure for the approved methods listed in R9-14-612, the laboratory shall demonstrate continued proficiency through audits provided by the EPA proficiency evaluation audit program, the Principal State Laboratory System proficiency evaluation audit program, if available, or from a

proficiency evaluation service accepted by the Department.

G. The Department may submit blind audit samples to a licensed laboratory.

H. The laboratory shall test all proficiency evaluation audit samples within holding times required by the approved method for each of the audit parameters and report the results to the proficiency evaluation service. Principal State Laboratory System chemistry proficiency evaluation audit sample results shall be reported to the Department within 32 months from the time of receipt. Principal State Laboratory System microbiology proficiency evaluation audit sample results shall be reported to the Department within 2 weeks from the time of receipt.

I. The Department shall issue a report of Principal State Laboratory System proficiency evaluation audit findings to the laboratory within 2 months of the deadline date for results of the proficiency evaluation audit.

R9-14-608. Approved Methods and References

A. All compliance samples shall be tested by approved methods and the results shall be validated by reference to the applicable quality assurance requirements listed in the following Key References; or in R9-14-609 through R9-14-612 as appropriate to the sample matrix, and/or as specifically required by ADEQ or EPA.

B. If approved methods are not available for a particular testing program, category of testing or parameter, and different methods are required by EPA or ADEQ, a lab may use another method if the method is approved by the Director.

1. For existing methods which are not approved methods under this Article, a laboratory may submit a petition to the Department requesting approval. The petition shall include reference to the EPA or ADEQ statue or rule which requires the use of the different method.
2. A laboratory may submit a petition to the Department requesting the approval of a recommended or locally developed procedure.

(a) The petition shall contain:

i) Name, telephone number, and address of the person submitting the petition;

ii) Identification of the pollutant or parameter for which approval of a recommended or locally developed procedure is being requested;

iii) Written justification for using the recommended or locally developed procedure including a detailed description if the recommended or locally developed procedure to the type of sample matrix for which its

use is intended, and reference to the EPA or ADEQ requirement to use a recommended or locally developed procedure; and

iv) Data which demonstrates the performance of the recommended or locally developed procedure in terms of accuracy, precision, reliability, ruggedness, ease of use and ability to achieve a detection limit appropriate for the proposed use of the method.

(b) The Department may approve a recommended or locally developed procedure if it determines that the criteria listed in R9-14-608(2)(a)(iv) have been demonstrated.

(c) The Department may require that the recommended or locally developed procedure be tested in parallel with a reference laboratory for precision and accuracy.

***

R9-14-609. Drinking Water Sample Matrix

Every laboratory which conducts compliance testing under

this rule shall follow the guidelines in Key Reference D3, excluding laboratory personnel educational and experience requirements, and use the following approved methods, unless a method falls under the alternate specifications pursuant to R9-14-608(A) or (B). To locate the source of the approved method, cross reference the capital letter listed under "Key" to the reference designation listed in R9-14-608. When the identification and measurement of radio nuclides other than those listed in subsections (E)(1) through (11) of this Section are required, Key reference "X" or "Y" is to be used, except in cases where alternative methods have been requested or approved in accordance with R9-14-608(A) through (C).

***

R9-14-610. Wastewater Sample Matrix

Every laboratory which conducts compliance testing under this rule shall use the following approved methods, unless a method falls under an alternate method pursuant to R9-14-608(A) or (B). To locate the source of the approved method, cross reference the capital letter listed under "Key" to the reference designation listed in R9-14-608(C).

***

R9-14-611. Solid, Liquid, and Hazardous Waste Sample Matrix

Every laboratory which conducts compliance testing under this rule shall use the following approved methods, unless required by ADEQ or EPA, or unless a method falls under an alternate method pursuant to R9-14-608(A) or (B). To locate

the source of the approved method, cross reference the capital letter listed under "Key" to the reference designation listed in R9-14-608(C).

***

R9-14-612. Air Sample Matrix

Every laboratory which conducts compliance testing under this rule shall use the following approved methods, unless a method falls under an alternate method pursuant to R9-14-608(A) or (B). To locate the source of the approved method, cross reference the capital letter listed under "Key" to the reference designation listed in R9-14-608(C).

***

R9-14-613. Quality Assurance

A. The laboratory shall have a written quality assurance plan that describes actions to be taken by the lab to ensure that routinely generated analytical data are scientifically valid and defensible and are of known and acceptable precision and accuracy. The written plan shall contain;

   a. A title page identifying the laboratory, date of review, and the laboratory director's signature of approval;
   b. A table of contents;
   c. A detailed statement of the laboratory organization, line of authority, and identification of principal quality assurance

personnel.

d. A statement of quality assurance objectives, including data quality objectives with precision and accuracy goals, and criteria for the laboratory to judge the acceptability of each testing.

e. Specifications for:
   i. The use of proper sample containers;
   ii. The proper preparation of sample containers;
   iii. The proper preservation of samples; and
   iv. Compliance sample maximum allowable holding times;

f. A procedure for documenting laboratory receipt of samples and tracking of samples throughout laboratory testing.

g. A procedure for analytical instrument calibration and frequency;

h. A copy of the laboratory's current license and list of licensed parameters;

i. A listing of the procedures for compliance testing data reduction, validation, and reporting. These procedures shall include the identification and treatment of data outliers, the determination of the completeness and accuracy of data transcription and all calculations;

j. A statement of the frequency of use and acceptance tolerance of all compliance testing quality control checks;

k. Preventive maintenance procedures and schedules;

l. Assessment procedures for data acceptability;

m. Corrective action procedures taken when results from analytical quality control checks are unacceptable. These procedures shall include the steps taken to demonstrate the presence of any interference if the precision, accuracy, or the practical quantitation limit of the reported compliance testing result is affected by interference; and

n. Procedures for chain-of-custody documentation, including procedures for the documentation and reporting of any deviation from the sample handling or preservation requirements listed in this Section.

B. The laboratory shall:

1. Have available on the premises all methods, equipment, reagents, and glassware necessary for the compliance testing for which the laboratory is licensed or is requesting licensure. If the laboratory documents its ability to perform the approved method and ensures that the analytical data generated are scientifically valid and defensible and are of known and acceptable precision and accuracy it may petition for an exemption only from this subsection;

2. Use only reagents of a grade equal to or greater than that called for by the approved methods referenced in R9-14-609 through R9-14-612;

3. Maintain complete and current Standard Operating Procedures (SOPs) for all licensed

methods;

4. Calibrate equipment according to the manufacturer's specifications and as required by the approved method;
5. Maintain calibration logs available for on-site review. Calibration and documentation thereof by a laboratory instrument service organization is acceptable;
6. Develop, document, and maintain current method detection limits and practical quantitation limits for each compliance parameter, approved method and sample matrix for each instrument of use.
7. Maintain all compliance testing equipment in good working order;
8. Maintain quality control charts which demonstrate the accuracy and precision of its compliance testing;
9. If a laboratory tests for a parameter for which quality control acceptance criteria is not specified, the laboratory must statistically develop limits from historical data. The mean and standard deviation for a minimum of 20 data points, excluding statistical outliers, must be determined. The limits shall be no more than 3 standard deviations from the mean and shall be in the detectable range; and
10. Discard or segregate all expired standards or reagents from all compliance testing.

R9-14-614. Operation

A. All samples accepted by a laboratory for compliance

testing shall be analyzed by that laboratory, except that samples, other than those submitted for performance evaluation audit purposes, may be forwarded to another laboratory licensed under this Article or certified by EPA for examination.

B. If the laboratory performing an examination is not the laboratory which accepted the sample, all reports shall include the name and address of the laboratory accepting the sample and the name and address of the laboratory actually examining the sample.

C. The laboratory shall:

1. Maintain the facility and utilities required for proper equipment operation and use of compliance testing approved methods.
2. Provide environmental controls such that laboratory conditions do not affect analytical results beyond established quality control limits established for the approved methods listed in R9-14-609 through R9-14-612;
3. Provide for storage, handling, and disposal of hazardous materials in accordance with all state and federal regulations; and
4. Maintain documentation on all analytical personnel involved in compliance testing. The documentation shall provide that all these personnel have been trained in the test procedures prior to their performance of unmonitored testing and the documentation shall include:
   a) Summary of analyst's education and professional experience.

b) Verification of the analyst's review of the laboratory Quality Assurance Plan, and the approved methods and laboratory Standard Operating Procedures used by the analyst for compliance testing.

c) Verification of the analyst's completion of monitored training which includes the actual use of the equipment and the use of proper laboratory technique. Verification shall include the name of the instructor, the duration of the training, and the date of completion of the training.

d) Verification of the analyst's completion of training classes, continuing education courses, seminars, and/or conferences, which relate to the testing procedures used by the analyst for compliance testing.

e) Verification of the analyst's successful completion of Initial Demonstration of Capability as required by the approved methods.

f) Records of analysis of proficiency evaluation testing.

R9-14-615. Laboratory Records and Reports

A. Records and reports required to be maintained by the Article shall be available for inspection and copying during normal business hours by representatives of the Department. Copied records can be removed from the

laboratory by the Department.

B. Records and reports of compliance testing shall be kept by the laboratory for at least 5 years. Records and reports for the most current 2 years shall be kept on-site and the remaining records and reports may be stored in a secure and easily accessible storage facility.

C. If Arizona compliance data is not available for inspection and copying, the laboratory shall make available for inspection and copying all current non-Arizona compliance data requested by Department representative to evaluate methods and procedures applied for by the laboratory.

D. Compliance testing records shall contain:

1. Sample information including a unique sample identification assigned by the laboratory, location or location code of sample collection, sample collection date and time, type of testing to be performed and the name of person who collected the sample;
2. The name and address of the facility or person submitting the sample to the laboratory;
3. The date, time and name of the person who receives the sample into the laboratory;
4. The date and time of testing;
5. The actual results of compliance testing, including all raw data, work sheets, and calculations performed;
6. The actual results of quality control data validating the test results including calibration

and calculations performed;

7. The name of the person or persons performing the test; and
8. A copy of the final report.

E. Complete laboratory personnel records shall be maintained as to:
   1. Academic training;
   2. Experience;
   3. Qualifications; and
   4. Applicable certifications and/or specialized training.

F. Analytical instrumentation performance records shall be maintained to demonstrate consistent standardization performance with standardized reference materials.

G. Reports of compliance testing shall contain:
   1. Laboratory name, address, and telephone number;
   2. Laboratory license number issued by the Department;
   3. Result of compliance testing in appropriate units of measure:
      a) Actual scientifically valid and defensible results of compliance testing in appropriate units of measure, obtained in accordance with the approved method and the laboratory Quality Assurance Plan, as described in R9-14-613, by use of proper laboratory technique.

b) Any result not obtained in accordance with the approved method and the laboratory Quality Assurance Plan by use of proper laboratory technique, shall be documented as such on the report.

4. A listing of each approved method used associated with the reported results;
5. Sample information including the unique sample identification assigned by the laboratory, location or location code of sample collection, sample collection date and time, the name of the person who submitted the sample to the laboratory;
6. The date of the final report; and
7. Laboratory director's or designee signature.

R9-14-616. Laboratory Safety

Licensed environmental laboratories shall comply with all applicable federal, state, and local regulations regarding occupational safety and health.

R9-14-617. Mobile Laboratories

A. A laboratory license is required for each mobile laboratory, unless the laboratory owner chooses the single licensure option described in R9-14-606(B). All requirements of this Article shall be met by the mobile laboratory.

B. Upon request, the owner of the laboratory shall provide information of its location and scope of its

compliance testing to the Department.

R9-14-618. Out-of-State Environmental Laboratory Licensure

A. Out-of-state laboratories applying for an initial license or a renewal license shall comply with the requirements of A.R.S. §§ 36-495 through 36-495.15 and this Article.

B. In addition to licensure fees, an out-of-state laboratory shall pay all actual expenses incurred by the Department as a result of its location in another state.

C. An out-of-state laboratory shall pay an amount sufficient to cover:

1. The estimated cost of all routine inspections during the licensure period of that laboratory.
2. The amount the actual costs of routine laboratory inspections exceed the estimated costs, and
3. Additional expenses incurred by the Department for each on-site investigation.